NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 93 May 13, 2016

Pages 29761–30156

OFFICE OF THE FEDERAL REGISTER

1985

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket Nos. PRM–50–108; NRC–2014–0171]

Fuel-Cladding Issues in Postulated Spent Fuel Pool Accidents

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM or the petition), PRM–50–108, submitted by Mr. Mark Edward Leyse (the petitioner). The petitioner requested that the NRC require power reactor licensees to perform evaluations to determine the potential consequences of various postulated spent fuel pool (SFP) accident scenarios. The evaluations would be required to be submitted to the NRC for informational purposes. The NRC is denying the petition because the NRC does not believe the information is needed for effective NRC regulatory decisionmaking with respect to SFPs or for public safety, environmental protection, or common defense and security.

DATES: The docket for the petition, PRM–50–108, is closed on May 13, 2016.

ADDRESSES: Please refer to Docket ID NRC–2014–0171 when contacting the NRC about the availability of information for this petition. You may obtain publicly-available information related to this petition by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0171. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *The NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Document collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "ADAMS Public Documents" and then select "*Begin Web-Based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in Section IV, "Availability of Documents," of this document.
- *The NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Daniel Doyle, Office of Nuclear Reactor Regulation; U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3748; email: *Daniel.Doyle@nrc.gov.*

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II. Reasons for Denial
III. Conclusion
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I. The Petition

Section 2.802 of title 10 of the *Code of Federal Regulations* (10 CFR), "Petition for rulemaking—requirements for filing," provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. The NRC received a petition dated June 19, 2014, from Mr. Mark Edward Leyse and assigned it Docket No. PRM–50–108 (ADAMS Accession No. ML14195A388). The NRC published a notice of docketing in the **Federal Register** (FR) on October 7, 2014 (79 FR 60383). The NRC did not request public comment on the petition because sufficient information was available for the NRC staff to form a technical opinion regarding the merits of the petition.

The petitioner requested that the NRC develop new regulations requiring that: (1) SFP accident evaluation models use data from multi-rod bundle (assembly) severe accident experiments for calculating the rates of energy release, hydrogen generation, and fuel cladding oxidation from the zirconium-steam reaction; (2) SFP accident evaluation models use data from multi-rod bundle (assembly) severe accident experiments conducted with pre-oxidized fuel cladding for calculating the rates of energy release (from both fuel cladding oxidation and fuel cladding nitriding), fuel cladding oxidation, and fuel cladding nitriding from the zirconium-air reaction; (3) SFP accident evaluation models be required to conservatively model nitrogen-induced breakaway oxidation behavior; and (4) licensees be required to use conservative SFP accident evaluation models to perform annual SFP safety evaluations of: postulated complete loss-of-coolant accident (LOCA) scenarios, postulated partial LOCA scenarios, and postulated boil-off accident scenarios.

The petitioner referenced recent NRC post-Fukushima MELCOR simulations of boiling-water reactor Mark I SFP accident/fire scenarios. The petitioner stated that the conclusions from the NRC's MELCOR simulations are non-conservative and misleading because their conclusions underestimate the probabilities of large radiological releases from SFP accidents.

The petitioner asserted that in actual SFP fires, there would be quicker fuel-cladding temperature escalations, releasing more heat, and quicker axial and radial propagation of zirconium (Zr) fires than MELCOR simulations predict. The petitioner stated that the NRC's philosophy of defense-in-depth requires the application of conservative models, and, therefore, it is necessary to improve the performance of MELCOR and any other computer safety models that are intended to accurately simulate SFP accident/fire scenarios.

The petitioner stated that the new regulations would help improve public and plant-worker safety. The petitioner asserted that the first three requested regulations, regarding zirconium fuel cladding oxidation and nitriding, as well as nitrogen-induced breakaway oxidation behavior, are intended to improve the performance of computer safety models that simulate postulated SFP accident/fire scenarios. The petitioner stated that the fourth requested regulation would require that licensees use conservative SFP accident evaluation models to perform annual SFP safety evaluations of postulated complete LOCA scenarios, postulated partial LOCA scenarios, and postulated boil-off accident scenarios. The petitioner stated that the purpose of these evaluations would be to keep the NRC informed of the potential consequences of postulated SFP accident/fire scenarios as fuel assembles were added, removed, or reconfigured in licensees' SFPs. The petitioner stated that the requested regulations are needed because the probability of the type of events that could lead to SFP accidents is relatively high.

The NRC staff reviewed the petition and, based on its understanding of the overall argument in the petition, identified and evaluated the following three issues:

- Issue 1: The requested regulations pertaining to SFP accident evaluation models are needed because the probability of the type of events that could lead to SFP accidents is relatively high.
- Issue 2: Annual licensee SFP safety evaluations and submission of results to the NRC is necessary so that the NRC is aware of potential consequences of postulated SFP accident/fire scenarios as fuel assemblies are added, removed, or reconfigured in licensees' SFPs.
- Issue 3: MELCOR is not currently sufficient to provide a conservative evaluation of postulated SFP accident/fire scenarios for use in the PRM-proposed annual SFP evaluations.

Detailed NRC responses to the three issues are provided in Section II, "Reasons for Denial," of this document.

II. Reasons for Denial

The NRC is denying the petition because the petitioner failed to present any significant information or arguments that would warrant the requested regulations. The first three requested regulations would establish requirements for how the detailed annual evaluations that would be required by the fourth requested regulation would be performed. It is not necessary to require detailed annual evaluations of the progression of SFP severe accidents because the risk of an SFP severe accident is low. The NRC defines risk as the product of the probability and the consequences of an accident. The requested annual evaluations are not needed for regulatory decisionmaking, and the evaluations would not prevent or mitigate an SFP accident. The petitioner described multiple ways that an extended loss of offsite electrical power could occur and how this could lead to an SFP fire. In order for an SFP fire to occur, all SFP systems, backup systems, and operator actions that are intended to prevent the spent fuel in the pool from being uncovered would have to fail. The NRC does not agree that more detailed accident evaluation models need to be developed for this purpose, as requested by the petitioner, because the requested annual evaluations are not needed for regulatory decisionmaking. The NRC recognizes that the consequences of an SFP fire could be large and that is why there are numerous requirements in place to prevent a situation where the spent fuel is uncovered.

This section provides detailed NRC responses to the three issues identified in the petition.

Issue 1: The Requested Regulations Pertaining to SFP Accident Evaluation Models Are Needed Because the Probability of the Type of Events That Could Lead to SFP Accidents Is Relatively High

The petitioner stated that the requested regulations pertaining to SFP accident evaluation models are needed because the probability of the type of events that could lead to SFP accidents is relatively high. The petitioner stated that an SFP accident could happen as a result of a leak (rapid drain down) or boil-off scenario. Furthermore, the petitioner notes that in the event of a long-term station blackout, emergency diesel generators could run out of fuel and SFP cooling would be lost, resulting in a boil-off of SFP water inventory and a subsequent release of radioactive materials from the spent fuel. The petitioner also provided several examples of events that could lead to a long-term station blackout and, ultimately, an SFP accident, such as a strong geomagnetic disturbance, a nuclear device detonated in the earth's atmosphere, a pandemic, or a cyber or physical attack.

NRC Response

Spent nuclear fuel offloaded from a reactor is initially stored in an SFP. The SFPs at all nuclear plants in the United States are robust structures constructed with thick, reinforced, concrete walls and welded stainless-steel liners. They are designed to safely contain the spent fuel discharged from a nuclear reactor under a variety of normal, off-normal, and hypothetical accident conditions (*e.g.,* loss of electrical power, loss of cooling, fuel or cask drop incidents, floods, earthquakes, or extreme weather events). Racks fitted in the SFPs store the fuel assemblies in a controlled configuration so that the fuel is maintained in a sub-critical and coolable geometry. Redundant monitoring, cooling, and water makeup systems are provided. The spent fuel assemblies are typically covered by at least 25-feet of water, which provides passive cooling as well as radiation shielding. Penetrations to pools are limited to prevent inadvertent drainage, and the penetrations are generally located well above spent fuel storage elevations to prevent uncovering of fuel from drainage.

Studies conducted over the last four decades have consistently shown the risk of an accident causing a zirconium fire in an SFP to be low. The risk of an SFP accident was examined in the 1980s as Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools," in light of increased use of high-density storage racks and laboratory studies that indicated the possibility of zirconium fire propagation between assemblies in an air-cooled environment (Section 3 of NUREG–0933, "Resolution of Generic Safety Issues," *http://nureg.nrc.gov/sr0933/*). The risk assessment and cost-benefit analyses developed through this effort, Section 6.2 of NUREG–1353, "Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools" (ADAMS Accession No. ML082330232), concluded that the risk of a severe accident in the SFP was low and appeared to meet the objectives of the Commission's Safety Goal Policy Statement public health objectives (51 FR 30028; August 21, 1986) and that no new regulatory requirements were warranted.

The risk of an SFP accident was re-assessed in the late 1990s to support a risk-informed rulemaking for permanently shutdown, or decommissioned, nuclear power plants in the United States. The study, NUREG–1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants" (ADAMS Accession No. ML010430066), conservatively assumed that if the water level in the SFP dropped below the top of the spent fuel, an SFP zirconium fire involving all of the spent fuel would occur, and thereby bounded those conditions associated with air cooling of the fuel (including partial-drain down scenarios) and fire propagation. Even with this conservative assumption, the study found the risk of an SFP fire to be low and well within the Commission's Safety Goals.

Additional mechanisms to mitigate the potential loss of SFP water inventory were implemented following the terrorist attacks of September 11, 2001, which have enhanced spent fuel coolability and the potential to recover SFP water level and cooling prior to a potential SFP zirconium fire (73 FR 76204; August 8, 2008). Based on the implementation of these additional strategies, the probability and, accordingly, the risk of an SFP zirconium fire initiation has decreased and is expected to be less than previously analyzed in NUREG–1738 and previous studies.

Following the 2011 accident at Fukushima Dai-ichi, the NRC took extensive actions to ensure that portable equipment is available to mitigate a loss of cooling water in the SFP. On March 12, 2012, the NRC issued Order EA–12–049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" (ADAMS Accession No. ML12054A735). This order required licensees to develop, implement, and maintain guidance and strategies to maintain or restore core cooling, containment, and SFP cooling capabilities following a beyond-design-basis external event. The NRC endorsed the Nuclear Energy Institute (NEI) guidance to meet the requirements of this order.[1] That guidance establishes additional mechanisms for mitigating a loss of SFP cooling water beyond the requirements in 10 CFR 50.54(hh)(2), such as installing a remote connection for SFP makeup water that can be accessed away from the SFP refueling floor.

Also, in 2014, the NRC documented a regulatory analysis in COMSECY–13–0030, "Staff Evaluation and Recommendation for Japan Lessons Learned Tier 3 Issue on Expedited Transfer of Spent Fuel" (ADAMS Accession No. ML13329A918), which considered a broad history of the NRC's oversight of spent fuel storage, SFP operating experience (domestic and international), as well as information compiled in NUREG–2161, "Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor" (ADAMS Accession No. ML14255A365). In COMSECY–13–0030, the NRC staff concluded that SFPs are robust structures with large safety margins and recommended to the Commission that assessments of possible regulatory actions to require the expedited transfer of spent fuel from SFPs to dry cask storage were not warranted. The Commission subsequently approved the staff's recommendation in the Staff Requirements Memorandum to COMSECY–13–0030 (ADAMS Accession No. ML14143A360).

As supported by numerous evaluations referenced in this document, the NRC has determined that the risk of an SFP severe accident is low. While the risk of a severe accident in an SFP is not negligible, the NRC believes that the risk is low because of the conservative design of SFPs; operational criteria to control spent fuel movement, monitor pertinent parameters, and maintain cooling capability; mitigation measures in place if there is loss of cooling capability or water; and emergency preparedness measures to protect the public. The information proposed to be provided to the NRC is not needed for the effectiveness of NRC's approach for ensuring SFP safety. The NRC notes that the issue of long-term cooling of SFPs is the subject of PRM–50–96, which was accepted for consideration in the rulemaking process (77 FR 74788; December 18, 2012) and is being addressed by the NRC's rulemaking regarding mitigation of beyond design-basis events (RIN 3150–AJ49; NRC–2014–0240).

Issue 2: Annual Licensee SFP Safety Evaluations and Submission of Results to the NRC Is Necessary So That the NRC Is Aware of Potential Consequences of Postulated SFP Accident/Fire Scenarios as Fuel Assemblies Are Added, Removed, or Reconfigured in Licensees' SFPs

The petitioner stated that the purpose of the proposed requirement is to keep the NRC informed of the potential consequences of postulated SFP accident/fire scenarios as fuel assemblies are added, removed, or reconfigured in licensees' SFPs.

NRC Response

The NRC does not agree that this is necessary because the NRC already evaluates SFP systems and structures during initial licensing and license amendment reviews. In addition, baseline NRC inspections provide ongoing oversight to ensure adequate protection. There are not sufficient benefits that would justify the new requirement proposed in the petition for SFP accident evaluations. The proposed new requirement for licensees to perform SFP evaluations would not prevent or mitigate an SFP accident or provide information that is necessary for regulatory decisionmaking. The annual licensee SFP safety evaluations and their results proposed to be provided to the NRC are not needed for the effectiveness of the NRC's approach to ensuring SFP safety.

The NRC issues licenses after reviewing and approving the design and licensing bases contained in the plant's safety analysis report. Licensees are required to operate the plant, including performing operations and surveillances related to spent fuel, in accordance with technical specifications and established practices and procedures for that plant. Any licensee changes to design, operational or surveillance practices, or approved spent fuel inventory limits or configuration changes must be evaluated using the criteria in 10 CFR 50.59, documented and retained for the duration of the operating license, and, if warranted, submitted to the NRC for prior approval.

The general design criteria (GDC) in appendix A to 10 CFR part 50 establish general expectations that licensees must meet through compliance with their plant-specific licensing basis. Several GDC apply to SFPs:

- Protecting against natural phenomena and equipment failures (GDC 2 and GDC 4);
- Preventing a substantial loss-of-coolant inventory under accident conditions (*e.g.*, equipment failure or loss of decay and residual heat removal) (GDC 61);
- Preventing criticality of the spent fuel (GDC 62); and
- Adequately monitoring the SFP conditions for loss of decay heat removal and radiation (GDC 63).

Additionally, emergency procedures and mitigating strategies are in place to address unexpected challenges to spent fuel safety. Multiple requirements in 10 CFR part 50, as well as recent NRC orders following the Fukushima Dai-ichi accident, require redundant equipment and strategies to address loss of cooling to SFPs and protective actions for plant personnel and the public to limit exposure to radioactive materials.

The NRC provides oversight of the licensee's overall plant operations and the SFP in several ways. The NRC inspectors ensure that spent fuel is stored safely by regularly inspecting reactor and equipment vendors; inspecting the design, construction, and use of equipment; and observing "dry runs" of procedures. At least two NRC resident inspectors are assigned to each site to provide monitoring and inspection of routine and special activities. They are aware of, and routinely observe, SFP activities involving fuel manipulation. The NRC inspectors use inspection procedures to guide periodic inspection activities, and the results are published in publicly-available inspection reports. Special inspections may be conducted, as necessary, to evaluate root causes and licensee corrective actions if site-specific events occur. Special inspections may also evaluate generic actions taken by some or all licensees as a result of an NRC order or a change in regulations.

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[1] See NEI 12–06, "Diverse and Flexible Coping Strategies (FLEX) Implementation Guide," dated August 2012 (ADAMS Accession No. ML12242A378), and JLD–ISG–2012–01, "Compliance with Order EA–12–049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events," dated August 2012 (ADAMS Accession No. ML12229A174).

In accordance with 10 CFR part 21, the NRC is informed of defects and noncompliances associated with basic components, which include SFPs and associated drain pipes and safety-related systems, structures, and components for makeup water. This information allows the NRC to take additional regulatory action as necessary with respect to defects and noncompliances. The NRC is also informed of events and conditions at nuclear power plants, as set forth in §§ 50.72 and 50.73. Depending upon the nature of the event or condition, a nuclear power plant licensee must inform the NRC within a specified period of time of the licensee's corrective action taken or planned to be taken. These reports also facilitate effective and timely NRC regulatory oversight. Finally, information identified by a nuclear power plant applicant or licensee as having a significant implication for public health and safety or common defense and security must be reported to the NRC within 2 days of the applicant's or licensee's identification of the information.

The annual evaluations requested in the petition would not provide information that is necessary for regulatory decisionmaking. The evaluations requested in the petition would postulate scenarios in which the normal cooling systems, the backup cooling methods, and the mitigation strategies have all failed to cool the stored fuel and would require the calculation of the time it would take for the stored fuel to ignite and how much of it would ignite. Due to the robustness of this equipment, the NRC views this sequence of events as extremely unlikely to occur. Since the current regulations require that the pool be designed to prevent the loss-of-coolant and subsequent uncovering of the fuel, the information that would be obtained from the proposed requirement in the petition would not impact the current design basis. Moreover, as discussed previously, the NRC's current regulatory infrastructure relevant to SFPs at nuclear power plants in the United States already contains information collection and reporting requirements that support effective NRC regulatory oversight of SFPs.

The NRC does not agree that it is necessary to impose a new requirement for licensees to perform annual evaluations of their SFPs because existing requirements and oversight are sufficient to ensure adequate protection of public health and safety.

Issue 3: MELCOR Is Not Currently Sufficient To Provide a Conservative Evaluation of Postulated SFP Accident/Fire Scenarios

The petitioner requested that the NRC establish requirements for SFP accident evaluation computer models to be used in the annual SFP evaluations requested in Issue 2. The petitioner stated that there are serious flaws with MELCOR, which has been used by the NRC to model severe accident progression in SFPs, and, therefore, MELCOR is not sufficient.

NRC Response

The NRC does not agree that it is necessary to establish requirements for SFP accident evaluation computer models because the annual SFP evaluations requested in Issue 2 are not necessary for regulatory decisionmaking. Therefore, it is not necessary for the NRC to establish requirements for how such an evaluation should be conducted. Furthermore, the NRC disagrees with the petitioner's statements that MELCOR is flawed.

There are inherent uncertainties in the progression of severe accidents. There are many interrelated phenomena that need to be properly understood; otherwise, conservatism in one area may lead to overall non-conservative results. Conservatism can be meaningfully introduced into the relevant analysis after the best estimate analysis is done and uncertainties are properly taken into account.

The important question for a severe accident analysis is whether the uncertainties are appropriately considered in the analysis results. For example, Section 9 of the SFP study (NUREG–2161) is devoted to discussing the major uncertainties that can affect the radiological releases (*e.g.,* hydrogen combustion, core concrete interaction, multi-unit or concurrent accident, or fuel loading). In addition, the regulatory analysis in COMSECY–13–0030 only relied on SFP study insights for the boiling-water reactors with Mark I and II containments, and, even then, the results were conservatively biased towards higher radiological releases. For other designs, the release fractions were based on previous studies (*i.e.,* NUREG–1738) that used bounding or conservative estimates.

The MELCOR computer code is the NRC's best estimate tool for severe accident analysis. It has been validated against experimental data, and it represents the current state of the art in severe accident analysis. In NUREG–2161, the NRC stated that "MELCOR has been developed through the NRC and international research performed since the accident at Three Mile Island in 1979. MELCOR is a fully integrated, engineering-level computer code and includes a broad spectrum of severe accident phenomena with capabilities to model core heatup and degradation, fission product release and transport within the primary system and containment, core relocation to the vessel lower head, and ex-vessel core concrete interaction." Furthermore, MELCOR has been benchmarked against many experiments, including separate and integral effects tests for a wide range of phenomena. Therefore, the NRC has determined that MELCOR is acceptable for its intended use.

Additional information about the capabilities of the MELCOR code to model SFP accidents can be found in the NRC response to stakeholder comments in Appendix E to NUREG–2161. The NRC also addressed questions regarding MELCOR in Appendix D to NUREG–2157, Volume 2, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (ADAMS Accession No. ML14196A107).

III. Conclusion

For the reasons described in Section II, "Reasons for Denial," of this document, the NRC is denying the petition under 10 CFR 2.803. The petitioner failed to present any information or arguments that would warrant the requested amendments. The NRC does not believe that the information that would be reported to the NRC as requested by the petitioner is necessary for effective NRC regulatory decisionmaking with respect to SFPs. The NRC continues to conclude that the current design and licensing requirements for SFPs provide adequate protection of public health and safety.

IV. Availability of Documents

The documents identified in the following table are available to interested persons as indicated. For more information on accessing ADAMS, see the **ADDRESSES** section of this document.

Date	Document	ADAMS accession number/ **Federal Register** citation
August 21, 1986	Safety Goals for the Operations of Nuclear Power Plants; Policy Statement; Republication.	51 FR 30028.
April 1989	NUREG–1353, "Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools".	ML082330232.
February 2001	NUREG–1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants".	ML010430066.
March 12, 2012	EA–12–049, "Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events".	ML12054A735.
August 2012	NEI 12–06, "Diverse and Flexible Coping Strategies (FLEX) Implementation Guide".	ML12242A378.
August 2012	JLD–ISG–2012–01, "Compliance with Order EA–12–049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events".	ML12229A174.
December 18, 2012	Long-Term Cooling and Unattended Water Makeup of Spent Fuel Pools	77 FR 74788.
November 12, 2013	COMSECY–13–0030, "Staff Evaluation and Recommendation for Japan Lessons Learned Tier 3 Issue on Expedited Transfer of Spent Fuel".	ML13329A918.
May 23, 2014	SRM–COMSECY–13–0030, "Staff Requirements—COMSECY–13–0030—Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel".	ML14143A360.
June 19, 2014	Incoming Petition (PRM–50–108) from Mr. Mark Edward Leyse	ML14195A388.
September 2014	NUREG–2157, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," Volume 2.	ML14196A107.
September 2014	NUREG–2161, "Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling-Water Reactor".	ML14255A365.
October 7, 2014	Notice of Docketing for PRM–50–108	79 FR 60383.

Dated at Rockville, Maryland, this 5th day of May, 2016.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2016–11212 Filed 5–12–16; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4010, 4041, 4071, and 4302

RIN 1212–AB33

Adjustment of Civil Penalties

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Interim final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is amending its regulations to adjust the penalties provided for in sections 4071 and 4302 of the Employee Retirement Income Security Act of 1974. This action is being taken in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget memorandum M–16–06. The regulations being amended are those on Penalties for Failure to Provide Certain Notices or Other Material Information (29 CFR part 4071) and Penalties for Failure to Provide Certain Multiemployer Plan Notices (29 CFR part 4302). Conforming amendments are also being made to the regulations on Annual Financial and Actuarial Information Reporting (29 CFR part 4010) and Termination of Single-Employer Plans (29 CFR part 4041).

DATES: The amendments are effective August 1, 2016. Also see Applicability, below.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Deputy Assistant General Counsel for Regulatory Affairs (*murphy.deborah@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026; 202–326–4400 extension 3451. (TTY and TDD users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4400 extension 3451.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This rule is needed to carry out the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The rule adjusts the maximum civil penalties that PBGC may assess for failure to provide certain notices or other material information.

PBGC's legal authority for this action comes from the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and from sections 4002(b)(3), 4071, and 4302 of the Employee Retirement Income Security Act of 1974.

Major Provisions of the Regulatory Action

This rule adjusts the maximum civil penalties that PBGC may assess under sections 4071 and 4302 of ERISA. The new maximum amounts are $2,063 for section 4071 penalties and $275 for section 4302 penalties.

Background

The Pension Benefit Guaranty Corporation (PBGC) administers title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Title IV has two provisions that authorize PBGC to assess civil monetary penalties.[1] Section 4302, added to ERISA by the Multiemployer Pension Plan

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[1] Under the Federal Civil Penalties Inflation Adjustment Act of 1990, a penalty is a civil monetary penalty if (among other things) it is for a specific monetary amount or has a maximum amount specified by Federal law. Title IV also provides (in section 4007) for penalties for late payment of premiums, but those penalties are neither in a specified amount nor subject to a specified maximum amount.

Amendments Act of 1980, authorizes PBGC to assess a civil penalty of up to $100 a day for failure to provide a notice under subtitle E of title IV of ERISA (dealing with multiemployer plans). Section 4071, added to ERISA by the Omnibus Budget Reconciliation Act of 1987, authorizes PBGC to assess a civil penalty of up to $1,000 a day for failure to provide a notice or other material information under subtitles A, B, and C of title IV and sections 303(k)(4) and 306(g)(4) of title I of ERISA.

The Federal Civil Penalties Inflation Adjustment Act of 1990 called for reports by the President to Congress about the effect of inflation on civil penalties and the adjustment of civil penalties for inflation. The Debt Collection Improvement Act of 1996 amended the 1990 act to require agencies to make inflation adjustments of civil monetary penalties by regulation in accordance with principles in the 1990 act. On July 10, 1997 (at 62 FR 36993), PBGC published a final rule to implement the 1996 act. That final rule added to PBGC's regulations parts 4071 and 4302, which provided that the maximum penalty amounts under sections 4071 and 4302 were $1,100 a day for section 4071 and $110 a day for section 4302.

Several of PBGC's regulations note that section 4071 penalties may be assessed for failure to provide notices or other material information required under those regulations, but only two mention the adjusted maximum amount. The two regulations that do so are those on Annual Financial and Actuarial Information Reporting (29 CFR part 4010) and Termination of Single-Employer Plans (29 CFR part 4041).

Adjustment of Civil Penalties

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,[2] which further amended the 1990 act. The 2015 act requires agencies to adjust civil monetary penalties for inflation and to publish the adjustments in the **Federal Register**. An initial adjustment must be made by interim final rule published by July 1, 2016, and effective by August 1, 2016. Subsequent adjustments must be promulgated by January 15 of each year after 2016. Adjustments must be based on changes in the Consumer Price Index, and the initial adjustment is to be made from the penalty level most recently established, other than by an adjustment under the 1990 act. The initial adjustment cannot increase a penalty more than 150 percent over its level on November 2, 2015. Adjusted penalties are to be rounded to the nearest dollar.

On February 24, 2016, the Office of Management and Budget issued memorandum M–16–06 on implementation of the 2015 act.[3] The memorandum provides guidance to agencies about how to comply with the act. In particular, the memorandum includes a table of multipliers to use for the initial adjustment. The multiplier for 1980 (when section 4302 was added to ERISA) is 2.80469. The multiplier for 1987 (when section 4071 was added to ERISA) is 2.06278. Applying these multipliers to the enacted maximum amounts of the two penalties yields new maximum penalty levels (rounded to the nearest dollar) of $280 for section 4302 and $2,063 for section 4071. But applying the 150-percent-maximum-increase rule, the maximum penalty under section 4302 may not exceed $275. Accordingly, PBGC is adjusting the maximum penalty under section 4071 to $2,063 and adjusting the maximum penalty under section 4302 to $275.

Given the prospect of annual adjustments of the maximum section 4071 penalty, PBGC is simply removing the references in its other regulations to the maximum amount of section 4071 penalties. Removal of these references has no substantive effect, since the operative provision for the maximum amount is in part 4071; and removal avoids the need for annual amendments to these other regulations to track adjustments in the maximum penalty level.

Applicability

The increases in the civil monetary penalties under sections 4071 and 4302 provided for in this rule apply on and after August 1, 2016.

Compliance With Regulatory Requirements

PBGC has determined, in consultation with the Office of Management and Budget, that this rule is not a "significant regulatory action" under Executive Order 12866.

PBGC has determined that notice and public comment on this interim final rule are unnecessary because the adjustment of civil penalties implemented in the rule is required by law. See 5 U.S.C. 553(b).

Because no general notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4010

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4041

Penalties, Pension insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 4071

Penalties.

29 CFR Part 4302

Penalties.

In consideration of the foregoing, PBGC amends 29 CFR parts 4010, 4043, 4071, and 4302 as follows:

PART 4010—ANNUAL FINANCIAL AND ACTUARIAL INFORMATION REPORTING

■ 1. The authority citation for part 4010 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1310.

§ 4010.14 [Amended]

■ 2. In § 4010.14, the words "of up to $1,100 a day for each day that the failure continues" are removed.

PART 4041—TERMINATION OF SINGLE-EMPLOYER PLANS

■ 3. The authority citation for part 4041 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1341, 1344, 1350.

§ 4041.6 [Amended]

■ 4. In § 4041.6, the words "of up to $1,100 a day for each day that the failure continues" are removed.

PART 4071—PENALTIES FOR FAILURE TO PROVIDE CERTAIN NOTICES OR OTHER MATERIAL INFORMATION

■ 5. The authority citation for part 4071 is revised to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1371.

§ 4071.3 [Amended]

■ 6. In § 4071.3, the figures "$1,100" are removed and the figures "$2,063" are added in their place.

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[2] Sec. 701, Public Law 114–74, 129 Stat. 599–601 (Bipartisan Budget Act of 2015).

[3] *https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.*

PART 4302—PENALTIES FOR FAILURE TO PROVIDE CERTAIN MULTIEMPLOYER PLAN NOTICES

■ 7. The authority citation for part 4302 is revised to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1452.

§ 4302.3 [Amended]

■ 8. In § 4302.3, the figures "$110" are removed and the figures $275" are added in their place.

Issued in Washington, DC, this 5 day of May, 2016.

W. Thomas Reeder,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2016–11296 Filed 5–12–16; 8:45 am]

BILLING CODE 7709–02–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022

Benefits Payable in Terminated Single-Employer Plans; Interest Assumptions for Paying Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's regulation on Benefits Payable in Terminated Single-Employer Plans to prescribe interest assumptions under the regulation for valuation dates in June 2016. The interest assumptions are used for paying benefits under terminating single-employer plans covered by the pension insurance system administered by PBGC.

DATES: Effective June 1, 2016.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy (*Murphy.Deborah@pbgc.gov*), Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) prescribes actuarial assumptions—including interest assumptions—for paying plan benefits under terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions in the regulation are also published on PBGC's Web site (*http://www.pbgc.gov*).

PBGC uses the interest assumptions in Appendix B to Part 4022 to determine whether a benefit is payable as a lump sum and to determine the amount to pay. Appendix C to Part 4022 contains interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using PBGC's historical methodology. Currently, the rates in Appendices B and C of the benefit payment regulation are the same.

The interest assumptions are intended to reflect current conditions in the financial and annuity markets. Assumptions under the benefit payments regulation are updated monthly. This final rule updates the benefit payments interest assumptions for June 2016.[1]

The June 2016 interest assumptions under the benefit payments regulation will be 0.75 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. In comparison with the interest assumptions in effect for May 2016, these interest assumptions represent a decrease of 0.25 percent in the immediate annuity rate and are otherwise unchanged.

PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the payment of benefits under plans with valuation dates during June 2016, PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects in 29 CFR Part 4022

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

In consideration of the foregoing, 29 CFR part 4022 is amended as follows:

PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 272, as set forth below, is added to the table.

Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
* *	*	*	*		*		*	
272	6–1–16	7–1–16	0.75	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 272, as set forth below, is added to the table.

Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments

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[1] Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) prescribes interest assumptions for valuing benefits under terminating covered single-employer plans for purposes of allocation of assets under ERISA section 4044. Those assumptions are updated quarterly.

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
* *	*	*	*		*		*	
272	6–1–16	7–1–16	0.75	4.00	4.00	4.00	7	8

Issued in Washington, DC, on this 5th day of May 2016.

Judith Starr,

General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2016–11297 Filed 5–12–16; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2016–0276]

RIN 1625–AA08

Special Local Regulation; Lake of the Ozarks, Lakeside, MO

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for certain waters of the Lake of the Ozarks. This action is necessary to provide for the safety of life on these navigable waters near Lakeside, MO, during a powerboat race on June 4, 2016. This regulation designates prohibited areas for the race course and associated safety buffer, spectator areas, and location for vessels to transit during the race at no wake speeds. Deviation from the established special local regulation must be authorized by the Captain of the Port Upper Mississippi River or a designated representative.

DATES: This rule is effective from 9 a.m. to 6 p.m. on June 4, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2016–0276 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LCDR Sean Peterson, Chief of Prevention, U.S. Coast Guard; telephone 314–269–2332, email *Sean.M.Peterson@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On March 16, 2016, the Lake Race Steering Committee notified the Coast Guard that it will be hosting a powerboat race from 9 a.m. until 6 p.m. on June 4, 2016. In response, on April 20, 2016, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Special Local Regulation; Lake of the Ozarks, Lakeside, MO (81 FR 23223). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this powerboat race. During the comment period that ended May 5, 2016, we received no comments.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register**. On March 16, 2016, the Coast Guard was notified of the event being held and an NPRM with a 15 day comment period was published on April 20, 2016. Though we are not providing a full 30 day notice period, the Coast Guard did provide notice and opportunity to comment through the NPRM process and is now providing less than 30 days notice before the final rule goes into effect on June 4, 2016. It is impracticable to provide a full 30-days notice because this rule must be effective June 4, 2016.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. The Captain of the Port (COTP) Upper Mississippi River has determined that potential hazards associated with the powerboat race are a safety concern. The purpose of this rule is to ensure safety of vessels and the navigable waters in the special local regulation before, during, and after the scheduled event.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published April 20, 2016. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM. This rule establishes a special local regulation from 9 a.m. until 6 p.m. on June 4, 2016, designating the race course and location of spectator areas. Vessels transiting near the course will be restricted to transiting at the slowest safe speed. This special local regulation covers navigable waters on the Lake of the Ozarks Osage Branch between miles 0 and 4. The Coast Guard has also posted a map depicting the location and restricted areas for this special local regulation in the docket. Six anchorage areas for spectators are designated and are also shown on the map and labeled as A through F. This map may be viewed as indicated under the **ADDRESSES** section. The duration of the regulation is intended to ensure the safety of vessels and these navigable waters before, during, and after the power boat race, scheduled from 9 a.m. to 6 p.m. No vessel or person will be permitted to deviate from the special local regulation without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive Orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, and duration of the special local regulation. Vessel traffic will be able to safely transit around the race course and spectators will have designated locations to view the race. Moreover, the Coast Guard is including event information in the Local Notice to Mariners, and the rule allows vessels to seek permission to deviate from the regulation.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A. above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a special local regulation designating the race course, location of spectator areas, and location for vessels to transit during the race at slowest safe speed. It is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—REGATTAS AND MARINE PARADES

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.T08–0276 to read as follows:

§ 100.T08–0276 Special Local Regulation; Lake of the Ozarks; Lakeside, MO.

(a) *Location.* The following areas are regulated areas:

(1) Lake of the Ozarks Osage Branch between miles 0 and 4; the Bagnell Dam and Birdsong Hollow Cove, covering the entire width of the branch. Access to the race course and associated safety buffer area will be prohibited to authorized vessels only. The safety buffer area for the course will be marked with blue buoy markers. Vessels transiting outside of the safety buffer area shall proceed at no wake speed. See attached map for additional information on location.

(2) Six designated areas will be available for spectators for the duration of the races. The designated anchorage areas will be marked with blue and yellow buoy marker. They are labeled A–F on the attached map. The anchorage areas are located a minimum of 100 feet outside the race course safety buffer area marked with blue buoy

markers. The six anchorages are located in the following areas: Branch Rd Point; Emerald Ln Point; Lotell Hollow Cove; McCoy Branch Cove; west of Duck Head Point; and Jennings Branch Cove. In addition to the listed designated anchorages, vessels may also anchor inside the protective coves.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Upper Mississippi River in the enforcement of the regulation.

(c) *Regulations.* (1) Under the general regulations in § 100.35, deviation from the regulations described in paragraph (a) of this section is prohibited unless authorized by the COTP Upper Mississippi River or designated representative.

(2) To seek permission to deviate from the regulation, contact the COTP or the COTP's designated representative via VHF–FM ch 16 or by calling Sector Upper Mississippi River at 314–269–2332.

(d) *Enforcement period.* This section will be enforced from 9 a.m. to 6 p.m. on June 4, 2016.

Dated: May 6, 2016.

M.L. Malloy,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2016–11339 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0384]

Drawbridge Operation Regulation; Grassy Sound Channel, Middle Township, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Grassy Sound Channel Bridge (West Ocean Drive/CR619) across the Grassy Sound Channel, mile 1.0, at Middle Township, NJ. This deviation is necessary to provide for the safety of runners during "The Wild Half" annual half marathon. This deviation allows the bridge to remain in the closed-to-navigation position.

DATES: This deviation is effective from 7:30 a.m. to 11 a.m. on May 15, 2016.

ADDRESSES: The docket for this deviation, [USCG–2016–0384] is available at *http://www.regulations.gov.* Type the docket number in the "SEARCH" box and click "SEARCH". Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Hal R. Pitts, Bridge Administration Branch Fifth District, Coast Guard, telephone 757–398–6222, email *Hal.R.Pitts@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Cape May County, Department of Public Works, that owns and operates the Grassy Sound Channel Bridge, has requested a temporary deviation from the current operating regulations to provide for the safety of runners during "The Wild Half" annual half marathon event. The bridge is a bascule draw bridge and has a vertical clearance in the closed position of 15 feet above mean high water.

The current operating schedule is set out in 33 CFR 117.721. Under this temporary deviation, the bridge will remain in the closed-to-navigation position from 7:30 a.m. to 11 a.m. on May 15, 2016. The Coast Guard has carefully considered the nature and volume of vessel traffic on the waterway in publishing this temporary deviation.

Vessels able to safely pass through the bridge in the closed position may do so at any time. The bridge will be able to open for emergencies and the New Jersey Intracoastal Waterway is an alternate route for vessels transiting the area. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transit to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 10, 2016.

Hal R. Pitts,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2016–11349 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2016–0250]

RIN 1625–AA87

Security Zone; Tall-Ship CUAUHTEMOC; Thames River, New London Harbor, New London, CT

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone around the Tall-Ship CUAUHTEMOC during its transit through the Long Island Sound Captain of the Port (COTP) Zone, and for the duration of its mooring on the Thames River in New London Harbor, New London, CT. This temporary final rule creates a 250-yard radius security zone encompassing all navigable waters around the Tall-Ship CUAUHTEMOC while in transit through Sector Long Island Sound's Captain of the Port (COTP) Zone, and a 100-yard radius temporary security zone while the vessel is anchored or moored in the Thames River in New London Harbor, New London, CT. This zone is needed to protect the Tall-Ship CUAUHTEMOC and its crew from destruction, loss, or injury from sabotage, subversive acts, or other malicious acts of a similar nature. Persons or vessels may not enter the security zone without permission of the COTP or a COTP designated representative.

DATES: This rule is effective without actual notice from May 13, 2016 until May 14, 2016. For the purposes of enforcement, actual notice will be used from May 1, 2016 until May 13, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2016–0250 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Jay TerVeen, Prevention Department, Coast Guard Sector Long Island Sound; telephone (203) 468–4446, email *Jay.C.TerVeen@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

COTP	Captain of the Port
DHS	Department of Homeland Security

FR Federal Register
NPRM Notice of Proposed Rulemaking

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because an NPRM would be impracticable and contrary to the public interest. Consequently, the Coast Guard did not have enough time to draft, publish, and receive public comment on this rulemaking via an NPRM and still publish a final rule before the event was scheduled to take place. Delaying this rulemaking by waiting for a comment period to run would also reduce the Coast Guard's ability to fulfill its statutory missions to protect and secure the ports and waterways of the United States.

Under 5 U.S.C. 553(d)(3), and for the same reasons as stated above, the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because immediate action is needed to respond to the potential security threats associated with having the Tall-Ship CUAUHTEMOC in U.S. Waters.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under the authority in 33 U.S.C. 1231. The Captain of the Port Long of Island Sound (COTP) has determined that vessels, within a 250-yard radius of the Tall-Ship CUAUHTEMOC while it is transiting and a 100-yard radius while it is moored, pose a potential security risk.

IV. Discussion of the Rule

This rule establishes a security zone from May 1, 2016 through May 14, 2016 for the Tall-Ship CUAUHTEMOC. This zone is needed to protect the Tall-Ship CUAUHTEMOC and its crew from destruction, loss, or injury from sabotage, subversive acts, or other malicious acts of a similar nature.

This rule prevents vessels from entering, transiting, mooring, or anchoring within the security zone unless authorized by the COTP or designated representative. The Coast Guard has determined that this security zone will not have a significant impact on vessel traffic due to its temporary nature, limited size, and the fact that vessels are allowed to transit the navigable waters outside of the security zone.

The Coast Guard will notify the public and local mariners of this safety zone through appropriate means, which may include, but are not limited to, publication in the **Federal Register**, the Local Notice to Mariners, and Broadcast Notice to Mariners.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive Order and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under Executive Orders 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

The Coast Guard determined that this rulemaking is not a significant regulatory action for the following reasons: (1) The enforcement of this security zone will be relatively short in duration; (2) persons or vessels desiring to enter the security zone may do so with permission from the COTP Sector LIS or a designated representative; (3) this security zone is designed in a way to limit impacts on vessel traffic, permitting vessels to navigate in other portions of the waterway not designated as a security zone; and (4) the Coast Guard will notify the public of the enforcement of this rule via appropriate means, such as via Local Notice to Mariners and Broadcast Notice to Mariners to increase public awareness of this security zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT.**

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security (DHS) Management Directive 023–01 and Commandant Instruction Manual (CIM) M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary security zone and is categorically excluded from further review under, paragraph 34(g) of figure 2–1 of the Commandant Instruction. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES.**

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0250 to read as follows:

§ 165.T01–0250 Security Zone; Tall-Ship CUAUHTEMOC; Thames River, New London Harbor, New London, CT.

(a) *Location.* The following areas are designated as security zones:

(1) All navigable waters within the Sector Long Island Sound Captain of the Port (COTP) Zone, extending from the surface to the bottom, within a 250-yard radius of the Tall-Ship CUAUHTEMOC.

(2) All navigable waters within the Thames River in New London Harbor, New London, CT, extending from the surface to the riverbed within a 100-yard radius of the Tall-Ship CUAUHTEMOC while it moored or anchored in the Thames River in New London Harbor, New London, CT.

(b) *Enforcement Period.* This section will be enforced from May 1, 2016 through May 14, 2016, unless terminated sooner by the COTP.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.33 apply. During the enforcement period, entry into, transit through, remaining within, mooring or anchoring within this temporary security zone is prohibited unless authorized by the Captain of the Port (COTP) or the designated representative.

(2) Vessel operators given permission to enter or operate in the temporary security zone must comply with all directions given to them by the COTP or the designated representatives. Those vessels may be required to be at anchor or moored to a waterfront facility.

(3) The "designated representative" is any Coast Guard commissioned, warrant, or petty officer who has been designated by the COTP to act on his behalf. The on-scene representative may be on a Coast Guard vessel, or onboard a federal, state, or local agency vessel that is authorized to act in support of the Coast Guard.

(4) Vessel operators desiring to enter or operate within the temporary security zone shall telephone the COTP at (203) 468–4401, or his designated representative via VHF channel 16 to obtain permission to do so.

Dated: April 19, 2016.

E.J. Cubanski, III,

Captain, U.S. Coast Guard, Captain of the Port Sector Long Island Sound.

[FR Doc. 2016–11253 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0274]

RIN 1625–AA00

Safety Zone; Navy UNDET, Apra Outer Harbor and Piti, GU

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for underwater detonation operations in the waters of Apra Outer Harbor and Piti, Guam. The Coast Guard believes this safety zone regulation is necessary to protect all persons and vessels that would otherwise transit or be within the affected areas from possible safety hazards associated with underwater detonation operations. Entry of vessels or persons into these zones is prohibited unless specifically authorized by the Captain of the Port Guam.

DATES: This rule is effective without actual notice from May 13, 2016 until May 16, 2016. For the purposes of enforcement, actual notice will be used from May 10, 2016, until May 13, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2016–0274 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Kristina Gauthier, Sector Guam, U.S. Coast Guard; (671) 355–4866, *Kristina.M.Gauthier@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
E.O.	Executive order

FR Federal Register
NPRM Notice of proposed rulemaking
Pub. L. Public Law
§ Section
UNDET Underwater detonation
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to public interest. The Coast Guard received notice of this operation on March 10, 2015, only 62 days before the operation is scheduled. As a result, the Coast Guard did not have time to issue a notice of proposed rulemaking. Thus, delaying the effective date of this rule to wait for a comment period to run would be impracticable because it would inhibit the Coast Guard's ability to protect vessels and waterway users from the hazards associated with this operation.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register**. Due to the late notice and inherent danger in underwater exercises, delaying the effective period of this safety zone would be contrary to the public interest.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Guam (COTP) has determined that potential hazards associated with the U.S. Navy training exercise, which include detonation of underwater explosives on May 10th through 13th and 16th, 2016, will be a safety concern for anyone within a 700-yard radius on the surface and 1400-yard radius underwater of the operation. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the exercise. Mariners and divers approaching too close to such exercises could potentially expose the mariner to flying debris or other hazardous conditions.

IV. Discussion of the Rule

This rule establishes safety zones from 8 a.m. through 4 p.m. on May 10th through 13th and 16th, 2016. The safety zones will cover all navigable waters within 700 yards on the surface and 1400 yards underwater of vessels and machinery being used by Navy. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the underwater detonation exercise. No vessel or person will be permitted to enter the safety zones without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on a number of these statutes and E.O.s, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, and duration of the safety zone. Vessel traffic will be able to safely transit around this safety zone which will impact a small designated area of in waters off of Piti Guam, for 8 hours for 3 days and in Apra Outer Harbor for 8 hours for 3 days. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting 8 hours a day for 5 days that will prohibit entry within 700 yards on the surface and 1400 underwater of vessels and machinery being used by Navy personnel. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record-keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—SAFETY ZONE; NAVY UNDET, APRA OUTER HARBOR AND PITI, GU.

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T14–0274 to read as follows:

165. T14–0274 Safety Zone; Navy UNDET, Apra Outer Harbor and Piti, GU.

(a) *Location.* The following areas, within the Guam Captain of the Port (COTP) Zone (See 33 CFR 3.70–15), from the surface of the water to the ocean floor, are safety zones:

(1) *Piti Guam May 10th through 12th.* All surface waters bounded by a circle with a 700-yard radius and all underwater areas bounded by a circle with a 1400 yard radius centered at 13 degrees 29 minutes 03 seconds North Latitude and 144 degrees 40 minutes 03 seconds East Longitude, (NAD 1983).

(2) *Apra Outer Harbor, Guam May 12th through 13th and 16th.* All surface waters bounded by a circle with a 700-yard radius and all underwater areas bounded by a circle with a 1400 yard radius centered at 13 degrees 27 minutes 42 seconds North Latitude and 144 degrees 38 minutes 30 seconds East Longitude, (NAD 1983).

(b) *Enforcement period.* This section will be enforced from 8 a.m. through 4 p.m. on May 10th through 13th and 16th, 2016.

(c) *Regulations.* The general regulations governing safety zones contained in § 165.23 apply. No vessels may enter or transit safety zones (a)(1) and no persons in the water may enter or transit safety zone (a)(2) unless authorized by the COTP or a designated representative thereof.

(d) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other COTP representative permitted by law, may enforce these temporary safety zones.

(e) *Waiver.* The COTP may waive any of the requirements of this section for any person, vessel, or class of vessel upon finding that application of the safety zone is unnecessary or impractical for the purpose of maritime security.

(f) *Penalties.* Vessels or persons violating this rule are subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192.

Dated: April 28, 2016.

James C. Campbell,

Commander, U.S. Coast Guard, Acting Captain of the Port, Guam.

[FR Doc. 2016–11361 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0265]

RIN 1625–AA00

Safety Zone; National Grid—Beck Lockport 104 & Beck Harper 106 Removal Project; Niagara River, Lewiston, NY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the Niagara River, Buffalo, NY. This safety zone is intended to restrict vessels from a portion of the Niagara River during the removal of international power lines spanning the Niagara River. This temporary safety zone is necessary to protect mariners and vessels from the navigational hazards associated with the removal of overhead power lines.

DATES: This rule is effective from 7:45 a.m. on May 16, 2016, through 6:15 p.m. on May 18, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2016–0265 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LTJG Amanda Garcia, Chief of Waterways Management, Sector Buffalo, U.S. Coast Guard; telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
E.O.	Executive order
NPRM	Notice of proposed rulemaking
Pub. L.	Public Law
§	Section
U.S.C.	United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The final details of this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be impracticable because it would inhibit the Coast Guard's ability to protect mariners and vessels from the hazards associated with the removal of international power lines. Therefore, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The Captain of the Port Buffalo (COTP) has determined that potential hazards associated with the removal of international power lines spanning the Niagara River starting May 16, 2016 will be a safety concern for anyone within the zone of the overhead power lines. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while overhead power lines are removed.

IV. Discussion of the Rule

This rule establishes a safety zone from 7:45 a.m. on May 16, 2016, through 6:15 p.m. on May 18, 2016, to be enforced only when power line removal operations are taking place. The safety zone will encompass all waters of the Niagara River; Lewiston, NY starting at position 43° 8′44.8692″ N., and 079° 2′32.8842″ W. then extending approximately 3,300 feet north along the international maritime border ending at position 43° 9′9.9648″ N., and 079° 2′39.681″ W. inward to the shoreline (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders (E.O.s) related to rulemaking. Below we summarize our analyses based on a number of these statutes and E.O.s, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be relatively small and enforced for a relatively short time only during the lowering and crossing of international power lines. Also, the safety zone is designed to minimize its impact on navigable waters. Furthermore, the safety zone has been designed to allow vessels to transit around it. Thus, restrictions on vessel movement within that particular area are expected to be minimal. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This safety zone would be effective, and thus subject to enforcement only during operations involving the lowering and passing of international power lines across the Niagara River. Traffic may be allowed to pass through the zone with the permission of the Captain of the Port. The Captain of the Port can be reached via VHF channel 16. Before the enforcement of the zone, we would issue local Broadcast Notice to Mariners.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES.** We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. *§ 165.T09–0265 Safety Zone; National Grid—Beck Lockport 104 & Beck Harper 106 Removal Project; Niagara River, Lewiston, NY.*

(a) *Location.* This zone will encompass all waters of the Niagara River; Lewiston, NY starting at position 43° 8′44.8692″ N., and 079° 2′32.8842″ W. then extending approximately 3,300 feet north along the international maritime border ending at position 43° 9′9.9648″ N., and 079° 2′39.681″ W., then south to the shoreline (NAD 83).

(b) *Enforcement period.* This regulation will be enforced intermittently while power line removal operations are taking place from 7:45 a.m. on May 16, 2016 through 6:15 p.m. on May 18, 2016.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Buffalo or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port Buffalo is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone must contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: April 22, 2016.

B.W. Roche,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2016–11363 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Parts 47 and 48

[167D0102DM; DLSN00000.000000; DS61400000; DX61401]

RIN 1090–AA98

Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This rule provides clarity in how the Department of the Interior administers certain provisions of the Hawaiian Homes Commission Act and the Hawaiian Home Lands Recovery Act. It facilitates the goal of the rehabilitation of the Native Hawaiian community, including the return of native Hawaiians to the land, consistent with the Hawaiian Homes Commission Act, the State of Hawaiʻi Admission Act, and the Hawaiian Home Lands Recovery Act. The rule clarifies the land exchange process for Hawaiian home lands, the documents required for land exchanges, and the respective responsibilities of the Department of the Interior, the Department of Hawaiian Home Lands, the Hawaiian Homes Commission, and other entities engaged in land exchanges of Hawaiian home lands. It also identifies the documentation requirements and the responsibilities of the Secretary of the Interior in the approval process for State of Hawaiʻi proposed amendments to the Hawaiian Homes Commission Act, 1920.

DATES: This rule is effective July 12, 2016.

ADDRESSES: The final rule is available on the internet at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ka'i'ini Kimo Kaloi, Director, Office of Native Hawaiian Relations, telephone (202) 208–7462.

SUPPLEMENTARY INFORMATION:

I. Background

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, to provide a homesteading program for native Hawaiians by placing approximately 200,000 acres of land (known as Hawaiian home lands) into the Hawaiian Home Lands Trust. The day-to-day administration of Hawaiian Home Lands Trust is by the Department of Hawaiian Home Lands (DHHL), an agency of the State of Hawai'i, headed by an executive board known as the Hawaiian Homes Commission (HHC). The HHCA provides the Chairman of the HHC the authority to propose to the Secretary of the Interior (Secretary) the exchange of Hawaiian home lands for land privately or publicly owned in furtherance of the purposes of the HHCA.

The HHCA also created a series of funds (the Hawaiian Home Lands Trust Funds, or "trust funds") *See, HHCA section 213 as amended.* The purpose of one of these trust funds is the "rehabilitation of native Hawaiians, native Hawaiian families, and Hawaiian homestead communities," which shall include "the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved and perpetuated." *Id.* Another in this series of trust funds seeks, for instance, to enhance construction of replacement homes, repairs or additions, and enhance development of farms, ranches or aquaculture, and to provide farm loans, including for soil and water conservation. Still another trust fund provides money for construction, reconstruction operations and maintenance of revenue-producing improvements intended to benefit occupants of Hawaiian home lands; for investments in water and other utilities, supplies, equipment, and goods; and for professional services needed to plan, implement, develop or operate such projects that will improve the value of Hawaiian home lands for their current and future occupants. Other money is provided to establish and maintain an account to serve as a reserve for loans issued or backed by the Federal Government, to further the purpose of the HHCA. The purposes and goals of these funds reflect congressionally identified purposes and goals of the HHCA.

In 1959, Congress enacted the Hawai'i Admission Act, 73 Stat. 4 (Admission Act), to admit the Territory of Hawai'i (Hawai'i or State) into the United States as a state. In compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution.

In section 223 of the HHCA, Congress reserved to itself the right to alter, amend, or repeal the HHCA. Consistent with this provision, section 4 of the Admission Act provides limitations on the State's administration of the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds (hereafter referred to together as the Trust) and also provides that the HHCA is subject to amendment or repeal by the State only with the consent of the United States. Recognizing, however, that it was vesting the State with day-to-day administrative authority, Congress in section 4 of the Admission Act also provided exceptions within which the State could amend certain administrative provisions of the HHCA without the consent of the United States. The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law.

Consistent with the provisions of the HHCA and the Admission Act, Congress enacted the Hawaiian Home Lands Recovery Act in 1995 (HHLRA), 109 Stat. 357, which provides that the Secretary shall determine whether a State-proposed amendment to the HHCA requires the consent of the United States under section 4 of the Admission Act. It is appropriately the function of the United States to ensure conformance with the limitations in the Admissions Act and protect the integrity of this statutory framework.

The HHLRA also clarified the Secretary's role in the oversight of the Hawaiian Home Lands Trust. Section 204(a)(3) of the HHCA, in conjunction with Section 205 of the HHLRA, requires the approval or disapproval of the Secretary for the exchange of Hawaiian home lands. The HHLRA details the Secretary's responsibilities to ensure that Hawaiian home lands are administered in a manner that advances the interests of the beneficiaries.

While the Secretary has broad responsibilities under the HHCA and the Admissions Act, the HHLRA clarifies the scope of the continuing responsibilities of the Federal Government with regard to the HHCA. Two of these responsibilities are addressed in the final rule. First, it clarifies the role of the Secretary in land exchanges and, second, clarifies the process for the Secretary's review of State-proposed amendments to the HHCA. As to HHC Chairman-proposed land exchanges, the HHLRA provides that the HHC Chairman submit a report to the Secretary, including identification of the benefits to the parties of the proposed exchange. The Secretary shall approve or disapprove the proposed exchange depending on whether it advances the interests of the beneficiaries. As to State-proposed amendments to the HHCA, the HHLRA requires the State to notify the Secretary of any amendment it proposes to the HHCA and then requires the Secretary to determine whether it impacts Federal responsibilities under the HHCA or infringes on Federal interests or those of the HHCA beneficiaries. If the Secretary determines the State's proposed amendment of the HHCA impacts the Federal responsibilities or infringes on either the Federal or beneficiaries' interests, the Secretary must submit the amendment to Congress for approval.

Since Hawai'i's admission to the Union, both Secretarial reviews occurred on an *ad hoc* basis using procedures accepted by the State and the Department. *See, letter dated August 21, 1987 to Chairman Morris Udall of the House Committee on Interior and Insular Affairs.* This rule establishes a clear process for Secretarial review and approval of land exchanges proposed by the HHC Chairman under the HHCA and HHLRA (Part 47), and of State-proposed amendments to the HHCA (Part 48).

II. Responses to Comments on the May 12, 2015 Notice of Proposed Rulemaking

On May 12, 2015, the Secretary issued a Notice of Proposed Rulemaking (NPRM), entitled "Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act." 80 FR 27134–27141 (May 12, 2015). The NPRM sought input from leaders and members of the Native Hawaiian community, HHCA beneficiaries, and the public about how the Secretary reviews land exchanges involving Hawaiian home lands proposed by the HHC Chairman and State-proposed amendments to the HHCA.

The NPRM set an initial 60-day comment period that ended on July 13, 2015. In response to requests from commenters, including the HHC on behalf of itself and HHCA beneficiaries, the Secretary extended the comment deadline another 30 days, ending on August 12, 2015. 80 FR 39991 (July 13, 2015).

The Secretary received over 500 written comments by the August 12, 2015 deadline. All comments received on the NPRM are available in the NPRM docket at *http://www.regulations.gov/#!documentDetail;D=DOI-2015-0002-0001.* Most of the comments revolved around a limited number of issues. The issues discussed below encompass the range of substantive issues presented in comments on the NPRM.

After careful review and analysis of the comments on the NPRM, the Department concludes that it is appropriate to publish a final rule that would set forth the administrative procedures for the review of land exchanges involving Hawaiian home lands proposed by the HHC Chairman and amendments to the HHCA proposed by the State.

Overview of Comments

The Department received comments from the Native Hawaiian community, the State, HHCA beneficiaries, and others. One fundamental question raised in the comments was whether the rule expands the Secretary's authority beyond the HHCA, Admission Act, and HHLRA. We conclude that the rule is within the Secretary's authority and consistent with long-standing practice under the HHCA, Admission Act, and HHLRA.

State-proposed amendments. On August 21, 1987, the Secretary forwarded to the House Committee on Interior and Insular Affairs, a proposed procedure, agreed upon by the State and Secretary, for obtaining the consent of the United States to State-proposed amendments to the HHCA. That procedure provided for the HHC Chairman forwarding the proposed amendment to the Secretary with an opinion from an appropriate legal officer of the State, followed by the Secretary examining the material transmitted and then submitting to Congress a proposed report and bill. The parties anticipated that most State-proposed amendments would be free of controversy and national implications and would be submitted to Congress once every one to two years. The Department endeavored to follow these procedures subsequently embodied in the HHLRA and in this rule.

Land exchanges. In the late 1970's, the State and the DHHL were resolving claims between themselves over lands that the State had allegedly withdrawn illegally from the Hawaiian Home Lands Trust, while also addressing claims against the United States for lands allegedly withdrawn illegally from the Hawaiian Home Lands Trust or used by the United States during the territorial period. Congress considered addressing these claims and implementing some recommendations of the Federal-State Task Force Report from 1983, such as the existing informal process of Secretarial review of land exchanges proposed by the HHC Chairman. Accordingly, Congress passed the HHLRA which provides procedures for settlement of federal claims (section 203); approval of amendments to the HHCA (section 204); and approval of exchanges involving Hawaiian home lands (section 205). The HHLRA also designated a federal official within the Department "to administer the responsibilities of the United States" under the HHCA and the HHLRA, and to protect and advance HHCA beneficiaries' rights and interests, including promoting homesteading opportunities, economic self-sufficiency, and social well-being (section 206). *See, Hawaiian Home Lands Recovery Act: Hearing before the Senate Committee on Energy and Natural Resources on S. 2174, 103d Cong., 9–10, 19 (1994). See, response to questions 3 and 40.*

HHCA beneficiaries. The HHLRA defines "beneficiary" in the same terms as "native Hawaiian" is defined in the HHCA, which was adopted as a provision of the constitution of the State as a compact with the United States. In 1959, when section 4 of the Admission Act referred to amendments that "increase the benefits to lessees of Hawaiian home lands," all lessees met the definition of "native Hawaiian" and had a blood quantum of at least 50 percent. Beginning in 1986, however, certain persons with a lesser blood quantum could obtain lessees through succession or transfer. *See, 100 Stat. 3143 (1986).* The HHLRA, nevertheless, defined beneficiary in terms of the HHCA definition, not in terms of lessees. Therefore, the rule evaluates and advances the interests of the beneficiaries as distinguished from all lessees.

Responses to Specific Issues Raised in the NPRM Comments

1. How do claims concerning the United States occupation of the Hawaiian Islands impact the rule?

Issue: Multiple commenters who objected to Federal rulemaking based their objections on the assertion that the United States violated and continues to violate international law by illegally occupying the Hawaiian Islands and thus is without jurisdiction on the Islands.

Response: The Department is an agency of the United States. The Secretary's authority to issue this rule derives from the United States Constitution and from Acts of Congress, and the Secretary's authority is confined within that structure. The Secretary is bound by Congressional enactments concerning the status of Hawai'i. Under those enactments and under the United States Constitution, Hawai'i is a State of the United States of America.

In 1893, a United States officer, acting without authorization of the U.S. government, conspired with residents of Hawai'i to overthrow the Kingdom of Hawaii. In the years following the 1893 overthrow, Congress annexed the Territory of Hawai'i and established a government for the Territory of Hawai'i. *See, Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898); Act of Apr. 30, 1900, 31 Stat. 141. In 1959, Congress admitted Hawai'i to the Union as the 50th State.* In 1993, Congress, through a joint resolution, apologized to Native Hawaiians for the overthrow and the deprivation of the rights of Native Hawaiians to self-determination, and expressed its support for reconciliation efforts with Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510, 1513 (commonly known as the "Apology Resolution").

The Apology Resolution, however, did not effectuate any changes to existing law. *See, Hawai'i* v. *Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009).* Thus, the Admission Act established the current status of the State of Hawai'i. The Admission Act proclaimed in section 1 that "the State of Hawai'i is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever." The Admission Act was consented to by the people of Hawai'i through an election held on June 27, 1959. The comments in response to the NPRM that call into question the legitimacy of the State of Hawai'i are inconsistent with the express determination of Congress, which is binding on the Department.

2. Is the definition of a beneficiary of the HHCA consistent with the requirements of Federal law?

Issue: Commenters questioned the Secretary's constitutional authority to promulgate rules for the Hawaiian Home Lands Trust, arguing that Congress's definition of a Native Hawaiian beneficiary is race-based because its use of a "blood quantum" violates the Constitution's guarantee of equal protection.

Response: The Federal Government has broad authority to regulate with respect to Native American communities. *See, U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause); Morton* v. *Mancari, 417 U.S. at 551–52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").* In the case of the Hawaiian Home Lands Trust, Congress specifically chose to use a 50 percent blood quantum requirement for all beneficiaries of the HHCA rather than a 1/32 blood quantum in order to make the bill more distinctly a Hawaiian rehabilitation scheme. *Proposed Amendments to the Organic Act of the Territory of Hawaiʻi: Hearings on H.R. 7257 Before the House Comm. On the Territories,* 66th Cong. 15 (1921). Acknowledging that the United States implemented similar rehabilitation programs for Indians because the government took away their lands without payment and violated treaties, Congressman Charles Curry, Chairman of the Committee on the Territories, said that it should be constitutional to do the same for the Hawaiians whose land had been taken away from them and noted that the Committee received opinions supporting the constitutionality of the proposed legislation from the Attorney General of Hawaiʻi and the Solicitor of the Department of the Interior. *Id.* at 141–142. Blood quantum reflects ties to the Native Hawaiian political community, as individuals marry within it. *Id.* at 140. And, as Congress explained, Congress "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous peoples of a once sovereign nation as to whom the United States has established a trust relationship." 114 Stat. 2968 (2000) (Hawaiian Homelands Homeownership Act).

3. Is the Hawaiian Homes Commission Act still Federal Law?

Issue: Commenters questioned whether the HHCA remains a Federal law, presuming that the passage of the Admission Act repealed it.

Response: Yes, the HHCA remains a Federal law. As explained in more detail above under "Background,", in compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution as a condition of its admission in 1959. The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law.

Furthermore, consistent with the provisions of the HHCA and the Admission Act, the HHLRA provides that the Secretary shall determine whether a proposed amendment to the HHCA requires the consent of the United States under section 4 of the Admission Act. It is appropriately the function of the United States to ensure conformance with the limitations in the Admission Act and protect the integrity of this statutory framework.

The HHLRA also clarified the role of the Secretary in the oversight of the Hawaiian Home Lands Trust. Section 204(a)(3) of the HHCA, in conjunction with section 205 of the HHLRA, requires the approval or disapproval of the Secretary for the exchange of Hawaiian home lands. The HHLRA details the Secretary's responsibilities to ensure that the administration of Hawaiian Home Lands Trust advances the interests of the beneficiaries.

The HHLRA thus confirms the continuing role of the Secretary in implementing the HHCA and defines the scope of the continuing responsibilities of the Federal Government related to approval of land exchanges of Hawaiian home lands and state-proposed amendments to the HHCA.

4. Is the Secretary's interpretation of the term "rehabilitation" as including political, cultural and social reorganization correct?

Response: The meaning of the term "rehabilitation" under the HHCA was provided for background purposes in the proposed rule, and resulted in a number of comments. We now clarify the Department's position.

The Secretary's interpretation of the term "rehabilitation" to include political, cultural, and social reorganization is consistent with both the statutory text and legislative history of HHCA. The term "rehabilitation" was added to the HHCA through the 1978 amendments to the Hawaiian Constitution. Section 213(i) of the HHCA, as amended, creates a "rehabilitation fund" that can be used for "the rehabilitation of native Hawaiians" including "educational, economic, political, social, and cultural processes." Congress consented to this language through a joint resolution approved October 27, 1986, thereby amending the HHCA. 100 Stat. 3143. The purposes and goals of the rehabilitation fund are congressionally identified as some of the purposes and goals of the HHCA.

Furthermore, the legislative history of the HHCA indicates that the bill's purpose was to protect the welfare of the Native Hawaiian people. *See, 67 Cong. Rec. 3263 (1921) (statement of Rep. Almon). Methods to achieve that purpose included revitalizing the "mode of living" of Native Hawaiians from prior generations. See, Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaiʻi: Before the House Comm. on the Territories,* 66th Cong 4 (1920) (quoting Sen. John H. Wise's testimony before the Territorial Legislature that: "[t]he Hawaiian people are a farming people and fishermen, out-of-door people, and [being] frozen out of their lands. . . . is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.").

In 1982 the Secretary and the Governor of Hawaiʻi created a task force whose purpose was to consider how to better effectuate the purposes of the HHCA. Federal-State Task Force on the Hawaiian Homes Commission Act Report to the Secretary of the Interior and the Governor of the State of Hawaiʻi, Honolulu, Hawaiʻi, August 1983, pp. 4, 8. That task force found that the term "rehabilitation" "implies that traditional and cultural practices of native beneficiaries, to the extent not precluded by law, should be respected and acknowledged by the DHHL in order to enable native beneficiaries to return to their lands and to provide for their self-sufficiency and initiative and for the preservation of their culture." *Id.* at 55. Thus, the term "rehabilitation" has been consistently interpreted in ways that support the development of the Hawaiian community itself. The

Secretary's interpretation of the term "rehabilitation" to include political, cultural, and social reorganization is consistent with the statutory language, congressional intent, and longstanding interpretation of the HHCA.

The funds Congress provided for in the HHCA represent factors that Congress identified as some of the purposes and goals of the HHCA. These purposes and goals guide the Secretary's review in determining whether a proposal advances the interests of the beneficiaries. Section 48.25 has been modified in response to these comments.

5. Should leaseholds to beneficiaries be converted to fee simple allocations of land?

Issue: Commenters recommend a path that would convert HHCA leaseholders into the outright owners of their leasehold property.

Response: Allowing for the conversion of leaseholds into fee simple ownership of Hawaiian home lands properties, which resembles the allotment process that was repudiated by Congress in 1934, is prohibited by current Federal law and is not within the scope of the rule.

6. Does the State of Hawaiʻi have the ability to amend the HHCA?

Issue: Commenters allege that the State has no ability to amend the HHCA through the process outlined in the Admission Act because it remains a Federal law.

Response: The HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law. The Admission Act provided that the State could amend certain provisions of the HHCA but expressly limited the State's authority. The HHLRA provides further clarification, providing that the Secretary shall determine whether a State-proposed amendment to the HHCA requires the consent or approval of Congress under section 4 of the Admission Act. If the State-proposed amendment is found not to require the approval of the United States, the rule provides that the effective date of the State-proposed amendment is the date of the Secretary's notification letter to the Congressional Committee Chairmen that Congressional approval was not required. It is appropriately the function of the United States to ensure conformity with the limitations in the Admission Act and protect the integrity of this Federal statutory framework.

7. Do parts 47 and 48 create an administrative burden that would make it more difficult for the State to move forward with land exchanges or amendments to the HHCA that would benefit the Hawaiian home lands program?

Issue: Commenters stated that while it may be lawful for the Secretary to engage in rulemaking, administrative requirements and criteria may constrain state officials and make it more difficult for them to proceed with land exchanges or amendments to the HHCA that they consider beneficial to the program.

Response: The three main Hawaiian Home Lands Trust statutes (the HHCA, the Admission Act, and the HHLRA) establish a trust relationship and grant the Secretary authority to protect and advance the interests of the beneficiaries. Section 206 of the HHLRA charges the Secretary with advancing the interests of the beneficiaries in administering the HHCA. Parts 47 and 48 will assist the Secretary in carrying out this responsibility and make the Secretary's actions more transparent to the public. Similarly, the rule will assist the State in understanding what information the Secretary considers necessary in order to evaluate the proposed actions. As evidenced by the fact that the HHLRA requires the Secretary to approve or disapprove all land exchanges involving Hawaiian home lands and to review all proposed amendments to the HHCA proposed by the State, Congress not only recognized the benefit of an independent Federal determination that the proposal advances the interests of the beneficiaries, but also recognized that the interests of the Hawaiian Home Lands Trust and its beneficiaries may not always coincide with the interests of the State and their overall program. Congress prioritized the interests of the beneficiaries and in doing so circumscribed the day-to-day administration of the Trust by the State, notwithstanding benefits to other State goals.

8. Should a federalism assessment be performed for this rule?

Issue: One commenter suggests that the rule has sufficient federalism implications to warrant the preparation of a federalism assessment in accordance with Executive Order 13132.

Response: No. While the HHCA, the Admission Act, and the HHLRA, limit what the State can do in administering the Trust, 43 CFR parts 47 and 48 merely provide a path for administering those Federal laws within the original limited delegation to the State in the Admission Act; thus, no federalism assessment needs to be performed. Recognizing the direct effect the three statutes have on the State and the benefits of working with the State to protect the beneficiaries and the Hawaiian Home Lands Trust, the Department held high level discussions with State officials as early as 2011 that resulted in this rulemaking to formalize the process for review of land exchanges and State proposed amendments to the HHCA.

As discussed above, the statutory framework of the HHCA, the Admission Act, and the HHLRA result in a compound of interdependent Federal and State law. Those laws undoubtedly have federalism implications. This rule, however, does not. In accordance with E.O. 13132, rules or policies have federalism implications if they "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Parts 47 and 48 have none of those effects. The rule merely formalizes the process the Secretary will use in reviewing and approving land exchanges and in reviewing proposed amendments to the HHCA under existing law, and clarifies the documentation that the HHC Chairman, an officer of the State of Hawaiʻi, must submit to implement existing law. The relationship between the State and the Secretary is unchanged by this rule. We expect the HHC Chairman will continue to submit proposed land exchanges and proposed amendments to the Secretary as it has since passage of the HHRLA. The distribution of power and responsibilities remains unchanged; the respective decision making authority of the Secretary and State are limited by section 4 of the Admission Act and sections 205 and 206 of the HHLRA. The only "direct effect" imposed on the State by this rule is the requirement to submit some additional documentation, which, given the level of documentation required and the frequency of submissions, does not rise to a "substantial direct effect." We therefore conclude that no federalism analysis is necessary.

9. Do parts 47 and 48 allow the Secretary to amend the HHCA?

Issue: Commenters suggest that parts 47 and 48 amend or allow the Secretary to amend the HHCA.

Response: The rule does not amend the HHCA. Parts 47 and 48 merely assist in the administration of the HHCA. One of the purposes of part 48 is, however, to provide clarity, consistent with Federal law, on what subjects under the HHCA the State may amend on its own and which subjects Congress must approve. Similarly, part 47 adds clarity to Federal review of land exchanges. This rulemaking process provided the public and all interested parties an opportunity to review and comment on the Department's existing process before it is replaced with a formalized one under this rule.

10. Should the Secretary monitor State legislation that poses a threat to the HHCA?

Issue: Commenters recommend that under part 48 the Secretary adequately monitor any legislation that would pose a threat to the HHCA.

Response: Section 204 of the HHLRA requires that the Chairman of the HHC submit for review by the Secretary and if required, congressional approval, all State enactments proposing to amend the HHCA. Any proposed amendments to any terms or provisions of the HHCA by the State should also specify that the proposed amendment seeks to amend the HHCA, which puts all persons on notice that the amendment needs review by the Secretary. Consistent with the Admission Act and HHCA, if Federal review finds that any State enactment impacts any of the factors in § 48.20 of this rule, Congressional action is required before it has any effect on the provisions of the HHCA or administration of the Trust. It is the responsibility of the HHC Chairman to monitor the State's legislative activities and to obtain the required review by the Secretary if it is the State's intent to amend the HHCA.

Once the Department determines that Congress must approve a proposed amendment to the HHCA and the Department transmits the proposed amendment to Congress, there is no requirement that the Administration monitor or advocate its passage. The Administration may oppose an amendment that does not advance the interests of the HHCA beneficiaries.

11. Do State-proposed amendments to the HHCA require Congressional approval or consent?

Issue: A commenter suggests that Congressional consent and not approval is required for certain proposed amendments to the HHCA.

Response: Congress provided in section 4 of the Admission Act that certain amendments to the HHCA would require the consent of the United States. Congress also clarified in section 204 of the HHLRA that the consent of the United States is provided through the approval by Congress. Thus, approval is required.

Section 204(c)(1) also requires the Secretary to submit to Congress a draft joint resolution approving the proposed amendment. Section 397, Joint Resolutions, of Jefferson's Manual of the House of Representatives of the United States Congress, provides, with the exception of joint resolutions proposing amendments to the Constitution, all resolutions are sent to the President for approval and have the full force of law.

12. Does § 47.50(a)(8)(i) authorize the State of Hawai'i to evict tenants from property being considered for a land exchange?

Issue: Multiple commenters expressed concern that § 47.50(a)(8)(i) authorizes the State to evict tenants from property being considered for a land exchange.

Response: Section 47.50(a)(8)(i) does not authorize the State or any other entity to evict tenants from property being considered for a land exchange. This provision asks that *if* a party to the exchange will evict a tenant from land being exchanged under separate legal authority, the party should provide the Secretary details of arrangements for the relocation of the tenants. The provision in § 47.50(a)(8)(i) does not expand or grant such authority. The provision in § 47.50(a)(8)(i) is almost identical to section 43 CFR 2201.1(c)(11) which applies to other Federal land exchanges. The purpose of both 43 CFR 2201.1(c)(11) and final rule 43 CFR 47.50(a)(8)(i) is to assist the Secretary in identifying all costs, both economic and social, to all persons directly affected by an exchange.

13. Should the definition of consultation in both parts 47 and 48 of this rule require face-to-face meetings with beneficiaries to be valid?

Issue: Commenters question whether consultation with beneficiaries without face-to-face meetings will allow for a sufficient opportunity to engage in dialogue with the beneficiaries, consider their views, and, where feasible, seek agreement with them.

Response: The definition of consultation in this rule provides a minimum requirement and is intended to give the Secretary, the HHC Chairman, as well as beneficiaries and interested parties, flexibility in the consultation process in order to efficiently and effectively engage beneficiaries and interested parties in informed consideration of proposed actions. Such actions may involve a wide spectrum of issues ranging from those that are singular, simple, and straight forward to those that are multifaceted and complicated or complex. Such actions may also vary from those that are mandatory to others that allow greater discretion. Face-to-face meetings may be necessary under certain circumstances while other means of communications, including but not limited to letters delivered by the postal service, email, teleconferences, etc., may be just as effective in other circumstances.

One commenter suggested requiring face-to-face consultations with beneficiaries and lessees who live within a 50-mile radius of the existing Hawaiian home lands to be exchanged or received into the Trust. While the rationale for not requiring face-to-face consultations presented in the previous paragraph still holds true, the Secretary encourages the State to engage in face-to-face consultations, at a minimum, within a 50-mile radius. The beneficiaries who live within a 50-mile radius of a proposed exchange will likely have a great deal of information important in making a decision about an exchange that would assist the Department in its review.

The final rule modified the definition of consultation in response to these comments.

14. Does § 47.45(a) impede the State's ability to engage in land exchanges involving Hawaiian home lands?

Issue: Commenters raised the question whether § 47.45(a), which recommends the HHC Chairman and the other party seeking the exchange meet with the Department prior to finalizing an exchange, would hamper the progress of land exchanges involving Hawaiian home lands.

Response: Section 47.45(a) is a suggested course of action and does not require pre-land exchange meetings. The Department finds, however, that getting all parties who are interested in a particular land exchange talking to one another can be extremely useful and time-saving. It is especially useful to have this type of pre-meeting to avoid the submission of a presumed final document that cannot be approved by the Department. The language of § 47.45(a) would leave it to the discretion of the HHC Chairman as to whether to engage in the pre-land exchange meeting. The meeting may be conducted via teleconferencing or web-conferencing rather than in-person.

15. Should § 47.65(b) clarify the circumstances under which the Secretary will consult with the beneficiaries when making a determination if a land exchange advances the interests of the beneficiaries?

Issue: Commenters suggest that it is unclear when and under what circumstances consultation might occur by the Secretary when reviewing a HHC Chairman-proposed land exchange.

Response: When reviewing a land exchange proposal submitted by the HHC Chairman, it is essential to the Secretary's decision-making process to have input from the beneficiary community about the effect the land exchange may have on the beneficiaries and the Hawaiian Home Lands Trust. The reason for making consultation under § 47.65(b) permissive is that if the HHC Chairman has already consulted with the beneficiaries on the land exchange proposal that is before the Secretary, and records of this consultation provide the input that the Secretary seeks, then no further consultation by the Secretary may be necessary. If the HHC Chairman forgoes consultation on a land exchange or a proposed amendment to the HHCA, the Secretary may be required to consult directly with the beneficiaries in order to approve the exchange or to find that an amendment does not require Congressional approval.

Upon consideration of the comments, language similar to that in § 47.65(b) was inserted into § 48.20.

16. Should the term "consultation" be better defined?

Issue: Commenters suggested that there be greater clarity and formalization as to when the Secretary would seek such consultation, what such consultation would entail, and how beneficiary input will be taken into account in any decision making process.

Response: The Department agrees with this point and modified the definition of consultation in both parts 47 and 48 so that they are consistent with the definition used by Federal agencies when consulting with the Native Hawaiian community under section 106 of the National Historic Preservation Act.

17. Are the standards for the review of land exchanges sufficiently clear to protect the interests of the beneficiaries?

Issue: Commenters suggest the standards for review of land exchanges is not sufficient to guarantee the Hawaiian Home Lands Trust will be preserved.

Response: The definition of land exchanges in section 47.10 is based upon section 204 of the HHCA and the Secretary's experience with reviewing land exchanges involving Hawaiian home lands and other properties throughout the United States. Exchanges can be a valuable tool for the HHCA Chairman in managing the Hawaiian Home Lands Trust and advancing the interests of the beneficiaries. Part 47 seeks to clarify the section 205 of HHLRA to ensure it is carried out in compliance with section 206 of the HHLRA that requires the Secretary, in administering the HHCA, to advance the interests of the beneficiaries. The protections provided by the HHCA, Admission Act, and HHLRA, along with the details laid out in part 47, allow the HHC Chairman to engage in land exchanges involving Hawaiian home lands without endangering the Trust.

18. Should the definition of "market value" be amended to take into consideration such things as utility and cultural significance of the properties?

Issue: Commenters suggest that when there are multiple reasons for a land exchange to occur that the appraisals of the properties should take those reasons into account.

Response: The Secretary is authorized to approve a land exchange under section 204 of the HHCA if the property to be added to the Hawaiian Home Lands Trust is of "equal value" to the property leaving the Hawaiian Home Lands Trust. The Secretary interprets this requirement to be referring to market value, similarly to the BLM land exchange regulations included in 43 CFR part 2200 that only consider the economic uses of the subject property. In order to approve the exchange, however, the Secretary must determine whether the proposed exchange advances the interests of the beneficiaries as required by section 206 of the HHLRA and as implemented in section 47.20 of this rule. At that point, the Secretary may take into account things such as the utility and cultural significance of the properties.

19. Should the Secretary ensure that the appreciation rate of any new property being proposed for inclusion in the Hawaiian Home Lands Trust be at least equal to the rate of return for the property proposed to leave the Hawaiian Home Lands Trust?

Issue: A commenter suggests that an appreciation rate of any new property being proposed for inclusion in the Hawaiian Home Lands Trust be at least equal to the rate of return for the trust property proposed to leave the Hawaiian Home Lands Trust. The example given by the commenter is that the return on the generation of electricity on a current trust property and the revenue it can potentially generate is more important than its present cash value of the property.

Response: The definition of market value used in this rule requires that the estimate of value be made in terms of cash or its equivalent. The appreciation rate and rate of return reflect future income potential, of the properties being considered in an exchange and will be considered in the appraisal of a property if the highest and best use of the property is for generating income. Properties considered for exchange will be valued at their highest and best use as required by UASFLA for market value appraisals. The income capitalization approach, which is required to be completed on income producing properties under UASFLA, requires the appraiser to analyze a property's ability to generate future benefits and capitalizes the income into an indication of present cash value. The result is that the market value of the property as of the date of appraisal takes into account future income and any appreciation by converting future benefits into a present cash value. If the two exchange properties have similar highest and best uses, similar capitalization rates would likely be used ensuring equal treatment of the properties under appraisal.

20. Should only Federal employees licensed in the State of Hawai'i be allowed to conduct appraisals of properties involved in an exchange involving Hawaiian home lands?

Issue: A commenter suggests only Federal employees licensed in the State of Hawai'i be allowed to conduct appraisals of properties involved in an exchange of Hawaiian home lands.

Response: The vast majority of Department's appraisals are completed by private contract appraisers under the direction of the Department. The review of those reports is done, however, exclusively by Federal employees. Requiring that appraisals be conducted by only Federal employees would place an unnecessary obstacle in the path of completing these land exchanges.

21. Should the Secretary include in 43 CFR part 47 a process that addresses section 205(c) of the HHLRA which authorizes the Secretary to initiate a land exchange involving Hawaiian home lands?

Issue: Commenters suggest 43 CFR part 47 include a process that addresses section 205(c) of the HHLRA which authorizes the Secretary to initiate a land exchange involving Hawaiian home lands.

Response: In this rule, the Department did not include procedures governing land exchanges involving Hawaiian home lands initiated by the Secretary, but chose to address the primary way in which land exchanges are currently initiated. The Department is unaware of any land exchange involving Hawaiian home lands being initiated or proposed to be initiated by the Secretary. Thus, the need to address such an exchange through rulemaking is not necessary. Should the Secretary decide to engage in a land exchange involving Hawaiian home lands under the authority of section 205(c) and (d), we will consider then what process is required and if a rule is warranted.

22. Should the factors listed in section 47.20 include "reduce the diversion of staff resources dedicated to deriving revenues from land dispositions to fund the DHHL's administrative and operating expenses"?

Response: It is unnecessary to specifically insert the suggested language as it is encompassed within section 47.20(i).

23. After approving or disapproving a proposed amendment to the HHCA, should the Secretary provide an email notice to the Native Hawaiian Organization List maintained by the Secretary and post on the Department of the Interior's Web site?

Response: The Secretary does not approve or disapprove proposed amendments to the HHCA but merely reviews proposed amendments to determine if Congressional approval is required. Following the required review, the Secretary will post notice of the determination on the Department of the Interior Web site.

24. Should the Secretary review and provide rulings to Congress and the HHC Chairman on State-proposed amendments to the HHCA that in accordance with their own provisions require Congressional approval to become effective?

Issue: The State will sometimes pass legislation that proposes to amend the HHCA but is expressly contingent on approval by Congress.

Response: When the State passes legislation that proposes to amend the HHCA but includes a provision that the effectiveness of the proposed amendment is contingent on approval by Congress, no proposal to amend the HHCA was made for purposes of section 206 of the HHLRA. In circumstances such as these, the State is merely taking on a general advisory role and providing advice to Congress on what Federal laws they should pass. Congress may consider the proposed amendment offered by the State of Hawai'i and this does not require a review under section 206 of HHLRA.

25. Is it the responsibility of DHHL and the HHC to determine whether proposed land exchanges are appropriate for the Hawaiian people?

Response: In accordance with section 205(b) of the HHLRA, "the Secretary shall approve or disapprove the proposed exchange" submitted by the HHC Chairman. While the Chairman may propose an exchange, the ultimate responsibility for determining the appropriateness of the proposed exchange remains with the Secretary.

26. Are the factors the Secretary will consider in analyzing a land exchange listed in section 47.20 too restrictive to allow for the proper use of the land exchange tool by the HHC Chairman?

Issue: A commenter suggests that the rule relies solely on the language listed in section 204(3) of the HHCA, which provides for an exchange of equal value "to consolidate its holdings or to better effectuate the purposes of the HHCA."

Response: Section 206 of the HHLRA requires that the Secretary "advance the interest of the beneficiaries" in administering the HHCA. Implementation of this provision is consistent with the purposes of section 204(a)(3) of the HHCA, which is to advance the interest of its beneficiaries when managing the Hawaiian Home Lands Trust. Section 47.20 articulates factors that are consistent with the purposes of the HHCA and with advancing the interest of the beneficiaries to provide transparency in the Secretary's decision making process. Section 47.20 of the rule implements both statutes in a consistent manner and utilizes the Secretary's expertise in reviewing land exchanges involving trust lands held for other U.S. indigenous communities.

27. Should the factors the Secretary will consider in analyzing a land exchange listed in section 47.20 be expanded to include such things as the development of Hawaiian home lands for mercantile use and to protect ecological and cultural resources?

Response: Section 47.20 specifies that the main purpose of engaging in a land exchange must be to advance the interests of the beneficiaries as provided in section 206 of the HHLRA. Accordingly, it lists the factors the Secretary will consider in analyzing a land exchange. These factors themselves are purposefully broad to allow flexibility in the analysis.

Moreover, in order for the exchange to be approved, the purpose of the land exchange must be well documented and demonstrate how the land exchange advances the interests of the beneficiaries. For instance, it would be insufficient under the rule for the party proposing the exchange to make only a conclusory statement that the exchange advances the interests of the beneficiaries without further explanation. Sections 47.20 and 47.30 provide the necessary information for the Secretary to make a reasoned decision to approve or disapprove a proposed land exchange.

28. Should there be a requirement that land exchanges not increase or decrease the acreage in the Trust in order to keep it whole?

Response: While acreage is an important aspect of determining the market value of properties involved in a land exchange, it is not the exclusive determining factor. For example, 50 acres of heavily sloped rocky land will likely not be as valuable as a smaller number of acres of usable farm land or other more readily developable acres. Therefore, the HHCA requires that the exchange be of equal value, not that the acreage be the same. The Secretary needs to ensure the market value of the property coming into the Hawaiian Home Lands Trust is equal to or greater than the property leaving the trust as required by section 204(c) of the HHCA, rather than rely on identical acreages.

29. Should the rule provide a more defined role for the Hawaiian Homes Commission in the review of land exchanges and amendments to the HHCA?

Issue: Commenters suggest that the rule specifically recognize the role of the HHC because of its fiduciary duty to the beneficiaries of the HHCA.

Response: Section 202 of the HHCA provides that the DHHL be headed by an executive board known as the HHC. The HHC and its Chairman are appointed by the Governor of the State of Hawai'i. The Chairman of the HHC is also the Director of DHHL and an Officer of the State of Hawaii. As officers of the State who are placed in their positions as Hawaiian Homes Commissioners to oversee the day-to-day management of the Hawaiian Home Lands Trust, the Secretary values their input. In response to comments, section 47.60(a)(1) now requires a statement of approval for a land exchange from the HHC, including the Commissioners' recorded vote on the exchange, and § 48.15(b)(2) requires that all testimony and correspondence from the HHC and its Commissioners related to proposed amendments be submitted to the Secretary in order to better inform the Secretary's review of proposed amendments to the HHCA. In addition, the rule now specifically references the Chairman of the HHC as submitting the State-proposed amendments to the HHCA and Chairman-proposed land exchanges to the Secretary to conform to the language in sections 204(a) and 205(a) of the HHLRA.

30. In addition to requiring the submission of homestead association testimony and correspondence regarding proposed amendments to the HHCA, should § 48.15 also require the same documents from beneficiary associations whose membership is composed of persons who have submitted applications to the State for homesteads but are currently awaiting the assignment of a lot?

Response: The Department appreciates the question. It is important for the Secretary to obtain the input of beneficiaries who are on the State's homestead waiting list as their priorities may diverge from the priorities of those beneficiaries who hold a homestead lease. Therefore, new definitions of HHCA Beneficiary Association and of Homestead Association are included in the rule and are referenced in § 48.15(b)(2), and beneficiaries are added to § 48.15(b)(2).

31. Should the definition of "beneficiary" include those Native Hawaiians with a blood quantum of more than 25 percent but less than 50 percent who qualify to receive a homestead through transfer or succession?

Response: Section 202 of the HHLRA states "the term 'beneficiary' has the same meaning as given the term 'native Hawaiian' under section 201(7) of the Hawaiian Homes Commission Act." Section 201(7) of the HHCA states, "Native Hawaiian means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Changing the definition of "beneficiary" to include those Native Hawaiians with a blood quantum of at least 25 percent but less than 50 percent who received a homestead through transfer or succession is not consistent with the HHLRA and HHCA and would require Congressional action.

32. Will the rule assist in meeting the Congressional deadlines for the review of State- proposed amendments to the HHCA and HHC Chairman-proposed land exchanges involving Hawaiian home lands?

Response: In order to provide a rational basis for decisions regarding land exchanges involving Hawaiian home lands and proposed amendments to the HHCA, the Secretary requires sufficient information on which to base those decisions. This rule details what information the Department requires to make an informed decision. The intention of the rule is to reduce the amount of time the Department takes to make an informed decision by providing clarity on the information necessary from the State about proposed land exchanges involving Hawaiian home lands or proposed amendments to the HHCA.

33. Should the purpose of the rule regarding land exchange procedures be for the benefit of the beneficiaries of the HHCA?

Response: While each part in the rule has a specific purpose, the overall purpose of the Secretary's oversight of the Hawaiian Home Lands Trust is to advance the interests of the beneficiaries of the HHCA in accordance with section 206(b) of the HHLRA. Advancement of these interests in both parts 47 and 48 must be specific to the interests of the beneficiaries, not others, and documented. For the purposes of an HHCA review, the interests of parties other than the beneficiaries are not relevant to the Secretary's decision making process; rather, the Secretary's approval is contingent upon a determination that the proposal does not decrease benefits to the beneficiaries. In response to comment, § 48.25 was modified to require that the Secretary consider the goals and purposes of the Trust when determining whether a proposed amendment to the HHCA decreases the benefits to the HHCA beneficiaries.

It is important to note that there are other factors the Secretary must find to approve a proposed land exchange in addition to finding that the proposed exchange advances the interest of the beneficiaries. *See, HHCA Section 204(a)(3) and final rule § 47.35 requiring the Department to ensure the market value of the property coming into the Trust is equal or greater than the property departing the Trust.* Similarly, a finding that a proposed amendment to the HHCA advances the interests of the beneficiaries does not obviate the need for Congressional approval. *See, Admission Act Section 4 (detailing circumstances in which Congress reserved its own authority over the Trust).* Consideration of whether a land exchange advances the interests of the beneficiaries or a proposed amendment decreases the benefits to beneficiaries are separate steps in the Secretary's review processes in both parts 47 and 48.

34. Should the rule require public input or a public vote when determining if a State-proposed amendment to the HHCA or HHC Chairman-proposed land exchange involving Hawaiian home lands is reviewed by the Secretary?

Response: When reviewing land exchanges involving Hawaiian home lands proposed by the Chairman of the HHC or State-proposed amendments to the HHCA, the Secretary will consider all information provided by the State, including any public input it received. For purposes of land exchanges, it is the Chairman's decision as to whether to include public input, including any vote results from the public, in a land exchange proposal submitted to the Secretary. Section 47.60 sets forth the documentation that the Chairman must submit to the Secretary in a land exchange packet, which, in response to this comment, now includes the recorded vote of the Commissioners. The rule requires in § 48.15 that the final vote totals for votes taken by the HHC and the State of Hawai‘i Legislature on a proposed HHCA amendment be forwarded to the Secretary when it is submitted for review. These vote totals help to provide the Secretary with a full picture of the State's position on a proposed amendment and whether that amendment decreases the benefits to the beneficiaries. This requirement is retained in the final rule.

35. Should the rule require that the HHC Chairman engage in consultation with the beneficiaries before any land exchange involving Hawaiian home lands is approved or the Secretary makes a final determination regarding a proposed amendment to the HHCA?

Response: The HHCA, Admission Act, and the HHLRA define the three parties involved in reviewing land exchanges involving Hawaiian home lands and proposed amendments to the HHCA. These parties are the State of Hawai‘i (represented by the DHHL and HHC), the HHCA beneficiary community, and the Federal Government (represented by the Secretary of the Interior). The beneficiary community obtains much of this voice through consultation with either the State or the Department.

Thus, while the HHC Chairman is not required to engage in consultation with the beneficiary community, without it the Department may not have sufficient information to evaluate whether a Chairman-proposed land exchange or a State-proposed amendment advances the interests of the HHCA beneficiaries.

36. Should the rule provide a definition of a homestead association?

Response: The Department agrees that the rule should provide a definition of a homestead association to provide clarity to the definition in the HHCA. The Secretary added a definition of homestead association in § 48.6 of this rule based on the language provided in sections 204(a)(2), 213, and 214(a) of the HHCA. This definition is also based on the definition of a Native Hawaiian organization listed in the National Historic Preservation Act and Native American Graves Protection and Repatriation Act (NAGPRA). The Secretary will maintain a list of the homestead associations that meet this definition and file a statement, signed by the association's governing body, of governing procedures and a description of the territory it represents.

37. Should the purpose of consultation be only to engage in good faith efforts to educate the beneficiaries, discuss and solicit their comments, and not to seek agreement?

Response: As the National Historic Preservation Act provides Federal agencies with guidance on how to work with the Native Hawaiian community, the Department chose to use the Act's definition of consultation for working with the Native Hawaiian beneficiary community. The National Historic Preservation Act defines consultation as the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement.

38. Do the rules already in place that deal with the treatment of land exchanges involving indigenous lands held in trust for Federally recognized tribes with whom the United States has a formal government-to-government relationship provide sufficient guidance to the Secretary when reviewing land exchanges involving Hawaiian home lands?

Response: No. The rules related to exchanges to lands held in trust are located in 25 CFR part 151 that do not apply to Hawaiian home lands. Congress enacted the HHCA and HHLRA to govern land exchanges involving Hawaiian home lands.

39. Is the rule necessary to provide HHCA beneficiaries with options to hold the DHHL and the State accountable when proposing land exchanges involving Hawaiian home lands and amendments to the HHCA?

Issue: A commenter questions the need for parts 47 and 48 and states "Beneficiaries have held DHHL as well as the State accountable through the judicial process, both federal and state; special legislative hearings; legislative audits; and media reports (including traditional print and TV media as well as social and internet based media resources). Statutorily, beneficiaries can pursue action for breaches of trust under Hawaii Revised Statutes Chapter 673 (Native Hawaiian Trusts Judicial Relief Act; aka Right to Sue)."

Response: Parts 47 and 48 seek to provide clarity and transparency in the Federal administration of the Hawaiian Home Lands Trust statutes. By providing this clarity, the Secretary can better implement section 206(b) of the HHLRA that requires the Secretary to administer these statutes in a way that advances the interests of the beneficiaries. This rule also seeks to provide transparency about what information is necessary to make decisions regarding HHC Chairman-proposed land exchanges involving Hawaiian home lands and State-proposed amendments to the HHCA. Such transparency should increase confidence of the beneficiary community in the decisions of the Secretary and State, thus minimizing any risk and need for litigation.

The rule incorporates consultation with the HHCA beneficiaries and consideration of the interests of the HHCA beneficiaries as provided by Congress in the HHLRA during the proposal and review processes. Such provisions address HHCA beneficiary concerns that they are often the last to be informed about proposed actions affecting their interests and are often informed after-the-fact when decisions have already been made. Such consultation should result in better-informed decision-making and lessen the need of beneficiaries to seek recourse after decisions have already been made.

40. Does the rule expand the Secretary's authority beyond the HHLRA?

Response: No. The rule simply provides uniform processes for implementing the authorities and responsibilities Congress granted the Secretary in the HHCA and HHLRA, consistent with the standards and requirements established by Congress in these and other applicable Federal laws, including those listed in § 47.15. It is important to note that Congress did not exempt the Secretary's actions under the HHLRA from other applicable Federal laws, such as Native American Graves Protection and Repatriation Act that directly apply to Hawaiian home lands.

The information delineated in this rule provides clarity in the Department's decisions regarding land exchanges involving Hawaiian home lands and amendments to the HHCA proposed by the State. While the Secretary will give weight to the State in its findings and analysis, the rule seeks to make certain the information gathered is substantive and reasonably verifiable in order to ensure the Hawaiian Home Lands Trust statutes are administered in a way that advances the interests of the beneficiaries as required by section 206 of the HHLRA.

41. Should the rule provide for recourse if the Secretary fails to follow the rule or act within specific timeframes?

Response: No. Congress provides for uniform and consistent systems of recourse and judicial review through other statutes, such as the Administrative Procedure Act, and has not provided any other specific recourse with regard to the Secretary's responsibilities under the HHCA or HHLRA.

42. Should the rule provide for automatic approval of a HHC Chairman-proposed land exchange or State-proposed amendments to the HHCA if the Secretary fails to follow the rule or act within specific timeframes?

Response: Automatic approval of HHC Chairman proposed land exchanges or State-proposed amendments to the HHCA is inconsistent with sections 204 and 205 of the HHLRA, section 4 of the Admission Act, and potentially section 206 of the HHLRA, which requires that these Hawaiian Home Lands Trust statutes be administered to advance the interests of the beneficiaries. Moreover, such automatic approvals would deprive the beneficiary community of the reasoned analysis and considered judgment of the Department in its exercise of these statutory responsibilities.

43. Should part 47 include a fast-track process for approval of land exchanges involving emergency situations, smaller acreages, less intense uses, or already developed land where the use will remain the same?

By following the provisions of sections 47.50–47.60, the HHC

Chairman and DHHL can dramatically reduce the amount of time necessary to complete a land exchange and increase the likelihood the exchange will be acted on by the Secretary without the delay necessitated by requests for additional information. In cases where a proposed land exchange is between the DHHL and another agency of the State or a Federal agency, where no change in land use is planned, a categorical exclusion under NEPA may be applicable as listed under Chapter 7.5 of the Department of the Interior Departmental Manual, which reduces the time required in preparation and review.

If the HHC Chairman chooses not to seek the assistance of the Secretary in developing an exchange proposal, the HHC Chairman may merely submit the documentation listed in § 47.60. In accordance with section 205 of the HHLRA, the Secretary will approve or disapprove the proposed exchange not later than 120 days after receiving the information required in § 47.60.

44. Does an assessment of beneficiary interests by the Secretary undermine the State's subject matter expertise and usurp the executive power of the HHC by re-evaluating the Commission's determination?

Response: No. While the Hawaiian Home Lands Trust statutes provide the State and its subdivisions, including the HHC and its Chairman, certain responsibilities, nowhere do they relieve the Secretary of the requirement in section 206(b) of the HHLRA to administer the Hawaiian Home Lands Trust statutes in a way that advances the interests of the beneficiaries. For proper care of the Trust to take place, all three parties, the State, the Secretary, and the beneficiary community, must work together and fulfill their respective duties assigned by Congress. It is because the Federal government has an independent interest in implementing the Trust and because Congress understood that the State and its subdivisions might have interests that conflict with the interests of the beneficiaries, that Congress required Secretarial approval or disapproval of the HHC Chairman-proposed land exchange or State proposed amendment to the HHCA in section 205 of the HHLRA and section 204 of the HHCA. In addition, the Secretary has an interest in enforcing Federal law within her responsibility.

45. Does the language "benefits to the parties of the proposed exchange" in section 205(a)(3) of the HHLRA require the Secretary to look at the benefits to the DHHL because the parties to an exchange will always be DHHL and another?

Response: No. Such language requires the Secretary to look at the benefits to the beneficiaries of the Hawaiian Home Lands Trust. This provision must be read to be consistent with section 206, which requires the Secretary to advance the interests of the beneficiaries. Such a reading is also consistent with the purposes of the HHCA. The Hawaiian Home Lands Trust was established for the benefit of the HHCA beneficiaries. Section 206(b)(1) of the HHLRA specifically directs the Department to "(1) advance the interests of the beneficiaries." To read the language in section 205(a)(1) as suggested by the commenter, gives no weight to this provision of section 206 and ignores the responsibilities of the State to the beneficiaries. In response to this comment, the language in § 47.30(a) was edited to remove the reference of "administration."

46. Does the rule limit the amount of consultation that the HHC Chairman or the Secretary may engage in with beneficiaries when reviewing Chairman-proposed land exchanges involving Hawaiian home lands or State-proposed amendments to the HHCA?

Response: The definition of consultation provided in both parts 47 and 48 outline the minimum requirements for consultation. If the HHC Chairman chooses to engage in additional consultation efforts or decides to require a higher standard, such as holding face-to-face consultation with beneficiaries on all proposed land exchanges and amendments to the HHCA, the Department supports such efforts as beneficial to the beneficiaries, the Chairman, and the Secretary.

47. If the factors from § 47.20 refer to the non-Hawaiian home lands that would be received, how are the benefits in retaining Hawaiian home lands determined in order to apply the balancing test in § 47.30(b)?

Response: The factors listed in § 47.20 are utilized by the Secretary to review both the non-Hawaiian home lands proposed to be received into the Hawaiian Home Lands Trust and the Hawaiian home lands the HHC Chairman proposes to remove from the Hawaiian Home Lands Trust. Section 47.30(b) provides explicit instruction on how the § 47.20 factors are to be weighed.

48. The Factors Listed in § 47.30(a) and (c) Are Ambiguous

Response: The language in § 47.30(a) is not ambiguous. It requires the exercise of judgment when reviewing land exchanges covering a wide range of circumstances. Section 47.30(a) emphasizes the need for the Secretary to consider the long term effects a land exchange will have on the lands in the Hawaiian Home Lands Trust. These trust lands are being held in order to advance the interests of the HHCA beneficiaries. Section 47.30(b) is intended to ensure that beneficiaries benefit from every exchange. Section 47.30(c) emphasizes the need for the Secretary to consider whether a proposed exchange will significantly conflict with the beneficiaries' interests in adjacent Hawaiian home lands.

49. Is the analysis presented in §§ 47.20 and 47.30 highly discretionary and provide for circumstances where the various factors may conflict?

Response: Section 204(a)(3) of the HHCA and section 205(b) of the HHLRA make clear that a land exchange is not valid until it has been approved by the Secretary, but does not suggest that the Secretary is required to approve every proposed land exchange. Indeed, Congress provided expressly in section 205(b) of the HHLRA that "the Secretary shall approve or disapprove the proposed exchange." The Secretary must also, at a minimum, be satisfied that the purposes of the Hawaiian Home Land Trust statutes are met. Each of these factors requires the exercise of judgment. Thus, the discharge of the responsibility placed on the Secretary is not ministerial. Nor is it "discretionary" as the factors to be considered are enumerated. There is, nonetheless, some subjectivity in the evaluation. Sections 47.20 and 47.30 provide factors to clarify the weighing process the Secretary must engage in when determining if a land exchange advances the interests of the beneficiaries. The factors in § 47.20, however, are not exhaustive.

It is possible certain proposed exchanges will present situations where certain factors listed in § 47.20 may conflict with each other. In those circumstances the Department will be required to exercise expertise and judgment within these limits in weighing the factors in order to determine whether a proposed land exchange advances the interests of the beneficiaries. If the factors listed in § 47.20 conflict with § 47.30 (a) and (c), however, the Secretary will be required to disapprove the proposed land exchange.

III. Summary of Impacts

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that rules must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. This final rule is consistent with these requirements.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this final rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) as the final rule merely describes agency procedures and practices when reviewing HHC Chairman-proposed land exchanges involving Hawaiian home lands and State-proposed amendments to the HHCA. These procedures and practices are not agency activities that will have a significant economic effect on a substantial number of small entities. This rule neither imposes burdens on small entities nor requires actions by them. As such, the Regulatory Flexibility Act does not apply.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final rule:

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act

This final rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The final rule does not have a significant or unique effect on State, local or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 as the taking of private property is not a subject covered or even contemplated under this rule. A takings implication assessment is not required.

6. Federalism (E.O. 13132)

In accordance with Executive Order 13132, the final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. Based on research and the deliberations outlined in the response to questions number 8, the final rule does not substantially and directly affect the relationship between the Federal and state governments. The Secretary of the Department of the Interior has oversight to ensure that land under the HHCA is administered in a manner that advances the interests of the beneficiaries. A federalism assessment is not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all rules be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all rules be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We evaluated this rule under the Secretary's consultation policy and under the criteria in Executive Order 13175 and determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Secretary's tribal consultation policy is not required.

9. Paperwork Reduction Act

This rule does not contain information collection requirements subject to the Paperwork Reduction Act and therefore a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

10. National Environmental Policy Act

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act, 1969 (NEPA) is not required. Under Departmental Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement "policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case." We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

11. Effects on the Energy Supply (E.O. 13211)

This final rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

12. Clarity of This Regulation

The Secretary is required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This rule meets the requirements that each rule the Secretary publishes must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

List of Subjects in 43 CFR Parts 47 and 48

Hawaii, Intergovernmental Programs, Land, State-Federal Relations.

Kristen J. Sarri,

Principal Deputy Assistant Secretary for Policy, Management and Budget.

For the reasons stated in the preamble, the Department of the Interior amends title 43 of the Code of Federal Regulations by adding new parts 47 and 48 as set forth below:

PART 47—LAND EXCHANGE PROCEDURES

Sec.

47.5 What is the purpose of this part?
47.10 What definitions apply to terms used in this part?
47.15 What laws apply to exchanges made under this part?

Subpart A—The Exchange Process

47.20 What factors will the Secretary consider in analyzing a land exchange?
47.30 When does a land exchange advance the interests of the beneficiaries?
47.35 Must lands exchanged be of equal value?
47.40 How must properties be described?
47.45 How does the exchange process work?
47.50 What should the Chairman include in a land exchange proposal for the Secretary?
47.55 What are the minimum requirements for appraisals used in a land exchange?
47.60 What documentation must the Chairman submit to the Secretary in the land exchange packet?

Subpart B—Approval and Finalization

47.65 When will the Secretary approve or disapprove the land exchange?
47.70 How does the Chairman complete the exchange?

Authority: State of Hawai'i Admission Act, 73 Stat. 4, approved March 18, 1959; Hawaiian Homes Commission Act, 1920, as amended, Act of July 9, 1921, 42 Stat. 108; Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 537, 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; 112 Departmental Manual 28.

§ 47.5 What is the purpose of this part?

This part sets forth the procedures for conducting land exchanges of Hawaiian home lands authorized by the Hawaiian Homes Commission Act, 1920 (HHCA).

§ 47.10 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section.

Appraisal or *Appraisal report* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of the lands or interests in lands to be exchanged as of a specific date(s), supported by the presentation and analysis of relevant market information.

Beneficiary or beneficiaries means "native Hawaiian(s)" as that term is defined under section 201(a) of the Hawaiian Homes Commission Act.

Chairman means the Chairman of the Hawaiian Homes Commission designated under section 202 of the Hawaiian Homes Commission Act.

Commission means the Hawaiian Homes Commission established by section 202 of the Hawaiian Homes Commission Act, which serves as the executive board of the Department of Hawaiian Home Lands.

Consultation or consult means representatives of the government engaging in an open discussion process that allows interested parties to address potential issues, changes, or actions. Consultation does not necessarily require formal face-to-face meetings. The complexity of the matter along with the potential effects that the matter may have on the Trust or beneficiaries will dictate the appropriate process for consultation. Consultation requires dialogue (oral, electronic, or printed) or a good faith, dialogue or documented effort to engage with the beneficiaries, consideration of their views, and, where feasible, seek agreement with the beneficiaries when engaged in the land exchange process.

DHHL or *Department of Hawaiian Home Lands* means the department established by the State of Hawai'i under sections 26–4 and 26–17 of the Hawai'i Revised Statutes to exercise the authorities and responsibilities of the Hawaiian Homes Commission under the Hawaiian Homes Commission Act.

Hawaiian Home Lands Trust means all trust lands given the status of Hawaiian home lands under section 204 of the Hawaiian Homes Commission Act, and those lands obtained through approval under this part, and as directed by Congress.

Hawaiian Home Lands Trust Funds means the funds established in the HHCA section 213.

Hazardous substances means those substances designated under Environmental Protection Agency regulations at 40 CFR part 302.

HHCA or *Hawaiian Homes Commission Act* means the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, as amended.

HHCA Beneficiary Association means an organization controlled by beneficiaries who submitted applications to the DHHL for homesteads and are awaiting the assignment of a homestead; represents and serves the interests of those beneficiaries; has as a stated primary purpose the representation of, and provision of services to, those beneficiaries; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the beneficiaries it represents.

HHLRA or *Hawaiian Home Lands Recovery Act* means the Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 357.

Homestead Association means a beneficiary controlled organization that represents and serves the interests of its homestead community; has as a stated primary purpose the representation of, and provision of services to, its homestead community; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the territory it represents.

Land exchange is any transaction, other than a sale, that transfers Hawaiian home lands from the Hawaiian Home Lands Trust to another entity and in which the Hawaiian Home Lands Trust receives the entity's land as Hawaiian home lands. A land exchange can involve trading Hawaiian home lands for private land, but it can also involve trading land between the Hawaiian Home Lands Trust and State or Federal agencies.

Market value means the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.

Native Hawaiian or *native Hawaiian* has the same meaning as that term defined under section 201(a) of the Hawaiian Homes Commission Act.

Office of Valuation Services (OVS) means the Office with real estate appraisal functions within the Office of the Assistant Secretary—Policy, Management, and Budget of the Department of the Interior.

Outstanding interests means rights or interests in property involved in a land exchange held by an entity other than a party to the exchange.

Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of the Secretary have been delegated.

Trust means the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds.

§ 47.15 What laws apply to exchanges made under this part?

(a) The Chairman may only exchange land under the authority of the HHCA in conformity with the HHLRA.

(b) When the Chairman makes any land exchange, the following laws and regulations constitute a partial list of applicable laws and regulations:

Legislation or regulation	Citation
(1) The National Historic Preservation Act, 1966	16 U.S.C. 470 et seq.
(2) Implementing regulations for the National Historic Preservation Act	36 CFR part 800.
(3) Section 3 of the Native American Graves Protection and Repatriation Act (NAGPRA)	25 U.S.C. 3002.
(4) Implementing regulations for the Native American Graves Protection and Repatriation Act	43 CFR part 10.
(5) The National Environmental Policy Act, 1969 (NEPA)	42 U.S.C. 4371 et seq.
(6) Implementing regulations for NEPA	40 CFR parts 1500–1508; 43 CFR part 46.
(7) The State of Hawai'i Admission Act	73 Stat. 4.
(8) Hawaiian Homes Commission Act, 1920, as amended	42 Stat. 108.
(9) Hawaiian Home Lands Recovery Act, 1995	109 Stat. 537.
(10) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)	42 U.S.C. 9601 et seq.
(11) Implementing regulations for CERCLA	40 CFR part 312.

No new legal rights or obligations are created through listing applicable laws and regulatory provisions in this section.

Subpart A—The Exchange Process

§ 47.20 What factors will the Secretary consider in analyzing a land exchange?

The Secretary may approve an exchange only after making a determination that the exchange will advance the interests of the beneficiaries. In considering whether a land exchange will advance the interests of the beneficiaries, the Secretary will evaluate the extent to which it will:

(a) Achieve better management of Hawaiian home lands;

(b) Meet the needs of HHCA beneficiaries and their economic circumstances by promoting:

(1) Homesteading opportunities,

(2) economic self-sufficiency, and,

(3) social well-being;

(c) Promote development of Hawaiian home lands for residential, agricultural, and pastoral use;

(d) Protect cultural resources and watersheds;

(e) Consolidate lands or interests in lands, such as agricultural and timber interests, for more logical and efficient management and development;

(f) Expand homestead communities;

(g) Accommodate land use authorizations;

(h) Address HHCA beneficiary needs; and

(i) Advance other identifiable interests of the beneficiaries consistent with the HHCA.

§ 47.30 When does a land exchange advance the interests of the beneficiaries?

A determination that an exchange advances the interests of the beneficiaries must find that:

(a) The exchange supports perpetuation of the Hawaiian Home Lands Trust;

(b) The interests of the beneficiaries in obtaining non-Hawaiian home lands exceeds the interests of the beneficiaries in retaining the Hawaiian home lands proposed for the exchange, based on an evaluation of the factors in § 47.20; and

(c) The intended use of the conveyed Hawaiian home lands will not significantly conflict with the beneficiaries' interests in adjacent Hawaiian home lands.

§ 47.35 Must lands exchanged be of equal value?

Hawaiian home lands to be exchanged must be of equal or lesser value than the lands to be received in the exchange, as determined by the appraisal. Once the market value is established by an approved appraisal, an administrative determination as to the equity of the exchange can be made based on the market value reflected in the approved appraisal.

§ 47.40 How must properties be described?

The description of properties involved in a land exchange must be either:

(a) Based upon a survey completed in accordance with the Public Land Survey System laws and standards of the United States; or

(b) If Public Land Survey System laws and standards cannot be applied, based upon a survey that both:

(1) Uses other means prescribed or allowed by applicable law; and

(2) Clearly describes the property and allows it to be easily located.

§ 47.45 How does the exchange process work?

(a) The Secretary recommends the parties prepare a land exchange proposal in accordance with § 47.50. The Secretary also recommends the Chairman and the non-Chairman party in the exchange meet with the Secretary before finalizing a land exchange proposal and signing an agreement to initiate the land exchange to informally discuss:

(1) The review and processing procedures for Hawaiian home lands exchanges;

(2) Potential issues involved that may require more consideration; or

(3) Any other matter that may make the proposal more complete before submission.

(b) Whether or not a land exchange proposal is completed, the Chairman initiates the exchange by preparing the documentation, conducting appropriate studies, and submitting them to the Secretary in accordance with § 47.60.

(c) Upon completing the review of the final land exchange packet under § 47.60, the Secretary will issue a Notice of Decision announcing the approval or disapproval of the exchange.

(d) If the Secretary approves an exchange, title will transfer in accordance with State law.

§ 47.50 What should the Chairman include in a land exchange proposal for the Secretary?

(a) A land exchange proposal should include the following documentation:

The proposal should include . . .	that should contain . . .
(1) Identifying information	(i) The identity of the parties involved in the proposed exchange; and (ii) The status of their ownership of the properties in the exchange, or their ability to provide title to the properties.
(2) Descriptive information	A legal description of: (i) The land considered for the exchange; and (ii) The appurtenant rights proposed to be exchanged or reserved.
(3) Authorized use information	(i) Any authorized uses including grants, permits, easements, or leases; and (ii) Any known unauthorized uses, outstanding interests, exceptions, adverse claims, covenants, restrictions, title defects or encumbrances.
(4) A time schedule for completing the exchange.	Expected dates of significant transactions or milestones.
(5) Assignment of responsibilities	Responsibilities for: (i) Performance of required actions; and (ii) Costs associated with the proposed exchange.
(6) Hazardous substance information.	Notice of: (i) Any known release, storage, or disposal of hazardous substances on non-Hawaiian Home Land Trust properties in the exchange; (ii) Any commitments regarding responsibility for removal or remedial actions concerning hazardous substances on non-Hawaiian Home Land Trust properties; and (iii) All terms and conditions regarding hazardous substances on non-Hawaiian Home Land Trust properties.
(7) Grants of permission by each party to the other.	Permission to enter the properties for the purpose of conducting physical examination and studies in preparation for the exchange. Written permission to appraise the properties should also be included.
(8) Three statements	Details of: (i) Arrangements for relocating tenants, if there are tenants, occupying the Hawaiian Home Land Trust and non-Hawaiian Home Land Trust properties involved in the exchange; (ii) How the land exchange proposal complies with the HHCA and HHLRA; and (iii) How the documents of conveyance will be exchanged once the Secretary has approved the exchange.

(b) When the parties to the exchange agree to proceed with the land exchange proposal, they may sign an agreement that the Chairman will initiate the exchange.

§ 47.55 What are the minimum requirements for appraisals used in a land exchange?

(a) The following table shows the steps in the appraisal process.

Appraisal process step	Requirements
(1) The parties to the exchange must arrange for appraisals.	(i) The parties must arrange for appraisals within 90 days after executing the agreement to initiate the land exchange, unless the parties agree to another schedule. (ii) The parties must give the appraiser the land exchange proposal, if any, and the agreement to initiate the land exchange, and any attachments and amendments. (iii) The Chairman may request assistance from the Office of Valuation Services (OVS). OVS can provide valuation services to the Chairman, including appraisal, appraisal review, and appraisal advice on a reimbursable basis. OVS is also available for post-facto program review to ensure that appraisals conducted by the State are in conformance with the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions as appropriate.
(2) The qualified appraiser must provide an appraisal report.	The appraiser must: (i) Meet the qualification requirements in paragraph (b) of this section; (ii) Produce a report that meets the qualifications in paragraph (c) of this section; and (iii) Complete the appraisal under the timeframe and terms negotiated with the parties in the exchange.
(3) The Secretary will review appraisal reports.	The Secretary will evaluate the reports using: (i) The Uniform Standards of Professional Appraisal Practice; and (ii) The Uniform Appraisal Standards for Federal Land Acquisitions.

(b) To be qualified to appraise land for exchange under paragraph (a)(2) of this section, an appraiser must:

(1) Be competent, reputable, impartial, and experienced in appraising property similar to the properties involved in the appraisal assignment; and

(2) Be approved by the OVS, if required by the Department of the Interior's Office of Native Hawaiian Relations.

(3) Be licensed to perform appraisals in the State of Hawai'i unless a Federal employee whose position requires the performance of appraisal duties. Federal employees only need to be licensed in one State or territory to perform real estate appraisal duties as Federal employees in all States and territories.

(c) Appraisal reports for the exchange must:

(1) Be completed in accordance with the current edition of the Uniform Standards of Professional Appraisal Practice (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA); and

(2) Include the estimated market value of Hawaiian home lands and non-Hawaiian home lands properties involved in the exchange.

§ 47.60 What documentation must the Chairman submit to the Secretary in the land exchange packet?

The documents in the exchange packet submitted to us for approval must include the following:

The packet must contain . . .	that must include . . .
(a) Required statements	(1) A statement of approval for the exchange from the Commission that includes the recorded vote of the Commission; (2) A statement of compliance with the National Historic Preservation Act and, as appropriate, a cultural and historic property review; (3) An explanation of how the exchange will advance the interests of the beneficiaries; (4) A summary of all consultations with beneficiaries, HHCA homestead associations, or HHCA beneficiary associations; and (5) A statement of compliance with the Native American Graves Protection and Repatriation Act.
(b) Required analyses and reports.	(1) Environmental analyses and records sufficient to meet CERCLA, NEPA, and all other pertinent Federal environmental requirements; (2) Land appraisal reports and statements of qualification of the appraisers in accordance with § 47.55; and (3) If property conveyed is adjacent to Hawaiian home lands: (i) An analysis of intended use of the Hawaiian home lands conveyed; (ii) A finding that the intended use will not conflict with established management objectives on the adjacent Hawaiian home lands; and (4) A copy of the land exchange proposal, if any.
(c) Relevant legal documents	(1) Any land exchange agreements entered into regarding the subject properties between Chairman and the non-Chairman party; (2) Evidence of title; and (3) Deeds signed by the parties, with a signature block for the Secretary of the Interior or our authorized representative to approve the transaction.

§ 47.65 When will the Secretary approve or disapprove the land exchange?

On receipt of the complete land exchange packet from the Commission, the Secretary will approve or disapprove the exchange within 120 calendar days.

(a) Before approving or disapproving the exchange, the Secretary will review all environmental analyses, appraisals, and all other supporting studies and requirements to determine whether the proposed exchange complies with applicable law and advances the interests of the beneficiaries.

(b) The Secretary may consult with the beneficiaries when making a determination if a land exchange advances the interests of the beneficiaries.

(c) After approving or disapproving an exchange, the Secretary will notify DHHL, the Commission, and other officials as required by section 205(b)(2) of the HHLRA. The Secretary will post notice of the determination on the DOI Web site and give email notice of the posting to all those on the notification list maintained by the Office of Native Hawaiian Relations requesting notice of actions by the Secretary.

§ 47.70 How does the Chairman complete the exchange once approved?

(a) The Chairman completes the exchange in accordance with the requirements of State law.

(b) The Chairman shall provide a title report to the Secretary as evidence of the completed exchange.

PART 48—AMENDMENTS TO THE HAWAIIAN HOMES COMMISSION ACT

Sec.

48.5 What is the purpose of this part?
48.6 What definitions apply to terms used in this part?
48.10 What is the Secretary's role in reviewing proposed amendments to the HHCA?
48.15 What are the Chairman's responsibilities in submitting proposed amendments to the Secretary?
48.20 How does the Secretary determine if the State is seeking to amend Federal law?
48.25 How does the Secretary determine if the proposed amendment decreases the benefits to beneficiaries of Hawaiian home lands?
48.30 How does the Secretary determine if Congressional approval is unnecessary?
48.35 When must the Secretary determine if the proposed amendment requires Congressional approval?
48.40 What notification will the Secretary provide?
48.45 When is a proposed amendment deemed effective?
48.50 Can the State of Hawai‘i amend the Hawaiian Homes Commission Act without Secretarial review?

Authority: State of Hawai‘i Admission Act, 73 Stat. 4, approved March 18, 1959; Hawaiian Homes Commission Act, 1920, 42 Stat. 108 *et seq.*, Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 537; 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; 112 Departmental Manual 28.

§ 48.5 What is the purpose of this part?

(a) This part sets forth the policies and procedures for:

(1) Review by the Secretary of amendments to the Hawaiian Homes Commission Act proposed by the State of Hawai‘i; and

(2) Determination by the Secretary whether the proposed amendment requires congressional approval.

(b) This part implements requirements of the Hawaiian Homes Commission Act, the State of Hawai‘i Admission Act, 1959, and the Hawaiian Home Lands Recovery Act, 1995.

§ 48.6 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section.

Beneficiary or beneficiaries means "native Hawaiian(s)" as that term is defined under section 201(a) of the Hawaiian Homes Commission Act.

Chairman means the Chairman of the Hawaiian Homes Commission designated under section 202 of the Hawaiian Homes Commission Act.

Commission means the Hawaiian Homes Commission, established by section 202 of the Hawaiian Homes Commission Act, which serves as the executive board of the Department of Hawaiian Home Lands.

Consultation or consult means representatives of the government engaging in an open discussion process that allows interested parties to address potential issues, changes, or actions. Consultation does not necessarily require formal face-to-face meetings. The complexity of the matter along with the potential effects that the matter may have on the Trust or beneficiaries will dictate the appropriate process for consultation. Consultation requires dialogue (oral, electronic, or printed) or a good faith, dialogue or documented effort to engage with the beneficiaries, consideration of their views, and, where feasible, seek agreement with the beneficiaries when engaged in the land exchange process.

DHHL or *Department of Hawaiian Home Lands* means the department established by the State of Hawai'i under sections 26–4 and 26–17 of the Hawai'i Revised Statutes to exercise the authorities and responsibilities of the Hawaiian Homes Commission under the Hawaiian Homes Commission Act.

Hawaiian Home Lands Trust means all trust lands given the status of Hawaiian home lands under section 204 of the Hawaiian Homes Commission Act, and those lands obtained through approval under part 47, and as directed by Congress.

Hawaiian Home Lands Trust Funds means the funds established in the HHCA section 213.

HHCA or *Hawaiian Homes Commission Act* means the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 *et seq.*, as amended.

HHCA Beneficiary Association means an organization controlled by beneficiaries who submitted applications to the DHHL for homesteads and are awaiting the assignment of a homestead; represents and serves the interests of those beneficiaries; has as a stated primary purpose the representation of, and provision of services to, those beneficiaries; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the beneficiaries it represents.

HHLRA or *Hawaiian Home Lands Recovery Act* means the Hawaiian Home Lands Recovery Act, 1995, 109 Stat. 537.

Lessee means either a:

(1) Beneficiary who has been awarded a lease under section 207(a) of the Hawaiian Homes Commission Act;

(2) Person to whom land has been transferred under section 208(5) of the Hawaiian Homes Commission Act; or

(3) Successor lessee under section 209 of the Hawaiian Homes Commission Act.

Homestead Association means a beneficiary controlled organization that represents and serves the interests of its homestead community; has as a stated primary purpose the representation of, and provision of services to, its homestead community; and filed with the Secretary a statement, signed by the governing body, of governing procedures and a description of the territory it represents.

Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of the Secretary have been delegated.

Trust means the Hawaiian Home Lands Trust and the Hawaiian Home Lands Trust Funds.

§ 48.10 What is the Secretary's role in reviewing proposed amendments to the HHCA?

(a) The Secretary must review proposed amendments to the Hawaiian Homes Commission Act (HHCA) by the State of Hawai'i to determine whether the proposed amendment requires approval of Congress.

(b) The Secretary will notify the Chairman and Congress of this determination, and if approval is required, submit to Congress the documents required by § 48.35(b).

§ 48.15 What are the Chairman's responsibilities in submitting proposed amendments to the Secretary?

(a) Not later than 120 days after the State approves a proposed amendment to the HHCA, the Chairman must submit to the Secretary a clear and complete:

(1) Copy of the proposed amendment;

(2) Description of the nature of the change proposed by the proposed amendment; and,

(3) Opinion explaining whether the proposed amendment requires the approval of Congress.

(b) The following information must also be submitted:

(1) A description of the proposed amendment, including how the proposed amendment advances the interests of the beneficiaries;

(2) All testimony and correspondence from the Director of the Department of Hawaiian Home Lands, Hawaiian Homes Commissioners, Homestead Associations, HHCA Beneficiary Associations, and beneficiaries providing views on the proposed amendment;

(3) An analysis of the law and policy of the proposed amendment by the Department of Hawaiian Home Lands and the Hawaiian Homes Commission;

(4) Documentation of the dates and number of hearings held on the measure, and a copy of all testimony provided or submitted at each hearing;

(5) Copies of all committee reports and other legislative history, including prior versions of the proposed amendment;

(6) Final vote totals by the Commission and the legislature on the proposed amendment;

(7) Summaries of all consultations conducted with the beneficiaries regarding the proposed amendment; and

(8) Other additional information that the State believes may assist in the review of the proposed amendment.

§ 48.20 How does the Secretary determine if the State is seeking to amend Federal law?

(a) The Secretary will determine that Congressional approval is required if the proposed amendment, or any other legislative action that directly or indirectly has the effect of:

(1) Decreasing the benefits to the beneficiaries of the Trust;

(2) Reducing or impairing the Hawaiian Home Land Trust Funds;

(3) Allowing for additional encumbrances to be placed on Hawaiian home lands by officers other than those charged with the administration of the HHCA;

(4) Changing the qualifications of who may be a lessee;

(5) Allowing the use of proceeds and income from the Hawaiian home lands for purposes other than carrying out the provisions of the HHCA; or

(6) Amending a section other than sections 202, 213, 219, 220, 222, 224, or 225, or other provisions relating to administration, or paragraph (2) of section 204, section 206, or 212 or other provisions relating to the powers and duties of officers other than those charged with the administration of the HHCA.

(b) The Secretary may consult with the beneficiaries when making a determination.

§ 48.25 How does the Secretary determine if the proposed amendment decreases the benefits to beneficiaries of Hawaiian home lands?

(a) In determining benefits to the beneficiaries, the Secretary will consider the goals and purposes of the Trust, including, but not limited to, the following:

(1) The provision of homesteads to beneficiaries;

(2) The rehabilitation of beneficiaries and their families and Hawaiian homestead communities;

(3) The educational, economic, political, social, and cultural processes by which the general welfare and conditions of beneficiaries are improved and perpetuated;

(4) The construction of replacement homes, repairs or additions;

(5) The development of farm, ranch or aquaculture, including soil and water conservation;

(6) The enhanced construction, reconstruction, operation and maintenance of revenue-producing improvements intended to benefit occupants of Hawaiian home lands;

(7) The making of investments in water and other utilities, supplies, equipment, and goods, as well as professional services needed to plan, implement, develop or operate such projects that will improve the value of Hawaiian home lands for their current and future occupants; and,

(8) The establishment and maintenance of an account to serve as a reserve for loans issued or backed by the Federal Government.

(b) The Secretary will determine if the proposed amendment or any other legislative action decreases the above-described or similar benefits to the beneficiaries, now or in the future, by weighing the answers to the following questions:

(1) How would the proposed amendment impact the benefits to current lessees of Hawaiian home lands?

(2) How would the proposed amendment impact the benefits to beneficiaries currently on a waiting list for a Hawaiian home lands lease?

(3) How would the proposed amendment impact the benefits to beneficiaries who have not yet applied for a Hawaiian home lands lease?

(4) If the interests of the beneficiaries who have not been awarded a Hawaiian home lands lease and the lessees differ, how does the proposed amendment weigh the interests of beneficiaries who have not been awarded a Hawaiian home lands lease with the interests of Hawaiian home lands lessees?

(5) If the interests of the beneficiaries who have not been awarded a Hawaiian home lands lease and the lessees differ, do the benefits to the lessees outweigh any detriment to the beneficiaries who have not been awarded a Hawaiian home lands lease?

(6) If the interests of the beneficiaries differ from the interests of the lessees, do the benefits to the beneficiaries outweigh any detriment to the lessees?

§ 48.30 How does the Secretary determine if Congressional approval is unnecessary?

The Secretary will determine that Congressional approval is unnecessary if the proposed amendment meets none of the criteria in § 48.20.

§ 48.35 When must the Secretary determine if the proposed amendment requires Congressional approval?

The Secretary will review the documents submitted by the Chairman, and if they meet the requirements of § 48.15, the Secretary will determine within 60 days after receiving them if the proposed amendment requires Congressional approval.

§ 48.40 What notification will the Secretary provide?

(a) If the Secretary determines that Congressional approval of the proposed amendment is unnecessary, the Secretary will:

(1) Notify the Chairmen of the Senate Committee on Energy and Natural Resources and of the House Committee on Natural Resources, the Governor, Speaker of the House of Representatives and President of the Senate of the State of Hawaiʻi, and the Chairman of the Hawaiian Homes Commission; and

(2) Include, if appropriate, an opinion on whether the proposed amendment advances the interests of the beneficiaries.

(b) If the Secretary determines that Congressional approval of the proposed amendment is required, the Secretary will notify the Chairmen of the Senate Committee on Energy and Natural Resources and of the House Committee on Natural Resources, the Governor, Speaker of the House of Representatives and President of the Senate of the State of Hawaiʻi, and the Chairman of the Hawaiian Homes Commission. The Secretary will also submit to the Committees the following:

(1) A draft joint resolution approving the proposed amendment;

(2) A description of the change made by the proposed amendment and an explanation of how the proposed amendment advances the interests of the beneficiaries;

(3) A comparison of the existing law with the proposed amendment;

(4) A recommendation on the advisability of approving the proposed amendment;

(5) All documentation concerning the proposed amendment received from the Chairman; and

(6) All documentation concerning the proposed amendment received from the beneficiaries.

(c) The Secretary will post notice of the determination on the Department of the Interior's Web site.

§ 48.45 When is a proposed amendment deemed effective?

(a) If the Secretary determines that a proposed amendment meets none of the criteria in § 48.20, the effective date of the proposed amendment is the date of the notification letter to the Congressional Committee Chairmen.

(b) If the Secretary determines that the proposed amendment requires congressional approval then the effective date of the proposed amendment is the date that Congress's approval becomes law.

§ 48.50 Can the State of Hawaiʻi amend the Hawaiian Homes Commission Act without Secretarial review?

The Secretary must review all proposed amendments to the Hawaiian Homes Commission Act. Any proposed amendments to any terms or provisions of the Hawaiian Homes Commission Act by the State must also specifically state that the proposed amendment proposes to amend the Hawaiian Homes Commission Act. Any state enactment that impacts any of the criteria in § 48.20 shall have no effect on the provisions of the HHCA or administration of the Trust, except pursuant to this part.

[FR Doc. 2016–11146 Filed 5–11–16; 12:00 pm]

BILLING CODE 4334–63–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1519 and 1552

[EPA–HQ–OARM–2015–0550; FRL 9945–69–OARM]

Environmental Protection Agency Acquisition Regulation; Small Business Programs, Solicitation Provisions and Contract Clauses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is issuing a final rule to remove outdated information and make administrative changes to the Environmental Protection Agency Acquisition Regulation (EPAAR). EPA does not anticipate any adverse comments.

DATES: This rule is effective on July 12, 2016 without further action, unless EPA receives adverse comment by June 13, 2016. If EPA receives adverse comment, a timely withdrawal will be published in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2015–0550, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Julianne Odend'hal, Policy, Training, and Oversight Division, Acquisition Policy and Training Service Center (3802R), Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–5218; email address: *odend'hal.julianne@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because EPA views this as a noncontroversial action and anticipates no adverse comments. EPAAR Parts 1519 and 1552 are being amended to remove outdated information and to make administrative changes. If EPA receives adverse comment, a timely withdrawal will be published in the **Federal Register** informing the public that the rule will not take effect. Any parties interested in commenting must do so at this time.

II. Does this action apply to me?

The EPAAR applies to contractors who have a contract with the EPA.

III. What should I consider as I prepare my comments for EPA?

A. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

IV. Background

EPAAR Parts 1519 and 1552 are being amended to remove outdated information and to make administrative changes.

V. Final Rule

This direct final rule makes the following changes: (1) Updates outdated terms throughout EPAAR Parts 1519 and 1552 by removing "Office of Small and Disadvantaged Business Utilization (OSDBU)" and adding "Office of Small Business Programs (OSBP)" in its place, removing "Small and Disadvantaged Business Utilization Specialists" and adding "Small Business Specialists" in its place, removing "Subcontracting with Small Business and Small Disadvantaged Business Concerns" and adding "Small Business Subcontracting Program" in its place; (2) amends section 1519.201 by removing the words "and the local" and adding the words "(CCO)s or Regional Acquisitions Managers (RAMs), the assigned" in its place; (3) amends section 1519.201–72, paragraph (a), by removing the words "for each contracting office", and adding the words "The appointing authorities for regional SBS are the RAMs. The SBSs for EPA headquarters, Research Triangle Park (RTP), and Cincinnati shall be appointed by the OSBP Director.", and removing the words "The appointing authorities are the Chiefs of the Contracting Offices."; (4) Amends Section 1519.201–72, paragraph (c), by removing subparagraph (6) and re-numbering subparagraphs (7) through (10) to read (6) through (9), and amends re-numbered subparagraph (9) to read "Act as liaison with the appropriate SBA office or representative in connection with matters concerning the small business programs including set-asides."; (5) amends section 1519.202–5, *Data Collection and Reporting Requirements,* by removing and reserving the section because this section is outdated; (6) amends section 1519.204, *Small Disadvantaged Business Participation,* by removing and reserving the section to conform to the FAR; (7) amends section 1552.219–70, paragraph (f), by removing the words "Standard Form 294, Subcontracts Report for Individual Contracts" and adding the words "Individual Subcontract Reports (ISR)" in its place; (8) amends section 1552.219–71, paragraph (e), by removing from subparagraph (4) the words "If recently required to submit a SF 295, provide copies of the two preceding year's reports;" (9) amends section 1552.219–71, paragraph (k) by removing the text and adding new text in its place; (10) amends section 1552.219–72, *Small Disadvantaged Business Participation Program,* section 1552.219–73, *Small Disadvantaged Business Targets,* section 1552.219–74, *Small Disadvantaged Business Participation Evaluation Factor,* by removing and reserving the sections to conform to the FAR.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action amends EPAAR parts 1519 and 1552 to remove outdated information and to make administrative changes. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communication between EPA and Tribal governments, EPA specifically solicits additional comment on this rule from Tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

K. Congressional Review

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 48 CFR Parts 1519 and 1552

Government procurement.

Dated: May 2, 2016.

John R. Bashista,

Director, Office of Acquisition Management.

For the reasons stated in the preamble, 48 CFR parts 1519 and 1552 are amended as set forth below:

■ 1. Revise part 1519 to read as follows:

PART 1519—SMALL BUSINESS PROGRAMS

Subpart 1519.2—Policies

Sec.
1519.201 Policy.
1519.201–71 Director of the Office of Small Business Programs.
1519.201–72 Small business specialists.
1519.202–5 [Reserved]
1519.203 Mentor-protégé.
1519.204 [Reserved]

Subpart 1519.5—Set-Asides for Small Business

1519.501 Review of acquisitions.
1519.503 Class set-aside for construction.

Subpart 1519.7—The Small Business Subcontracting Program

1519.705–2 Determining the need for a subcontract plan.
1519.705–4 Reviewing the subcontracting plan.
1519.705–70 Synopsis of contracts containing Pub. L. 95–507 subcontracting plans and goals.

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

Subpart 1519.2—Policies

1519.201 Policy.

Each program's Assistant or Associate Administrator shall be responsible for developing its socioeconomic goals on a fiscal year basis. The goals shall be developed in collaboration with the supporting Chiefs of Contracting Offices (CCOs) or Regional Acquisition Managers (RAMs), the assigned Small Business Specialist (SBS), and the Office of Small Business Programs (OSBP). The goals will be based on advance procurement plans and past performance. The goals shall be submitted to the Director of OSBP, at least thirty (30) days prior to the start of the fiscal year.

1519.201–71 Director of the Office of Small Business Programs.

The Director of the Office of Small Business Programs (OSBP) provides guidance and advice, as appropriate, to

Agency program and contracts officials on small business programs. The OSBP Director is the central point of contact for inquiries concerning the small business programs from industry, the Small Business Administration (SBA), and the Congress; and shall advise the Administrator and staff of such inquiries as required. The OSBP Director shall represent the Agency in the negotiations with the other Government agencies on small business programs matters.

1519.201–72 Small business specialists.

(a) Small Business Specialists (SBSs) shall be appointed in writing. Regional SBSs will normally be appointed from members of staffs of the appointing authority. The appointing authorities for regional SBSs are the RAMs. The SBSs for EPA headquarters, Research Triangle Park (RTP), and Cincinnati shall be appointed by the OSBP Director. The SBS is administratively responsible directly to the appointing authority and, on matters relating to small business programs activities, receives technical guidance from the OSBP Director.

(b) A copy of each appointment and termination of all SBSs shall be forwarded to the OSBP Director. In addition to performing the duties outlined in paragraph (c) of this section that are normally performed in the activity to which assigned, the SBS shall perform such additional functions as may be prescribed from time to time in furtherance of overall small business programs goals. The SBS may be appointed on either a full- or part-time basis; however, when appointed on a part-time basis, small business duties shall take precedence over collateral responsibilities.

(c) The SBS appointed pursuant to paragraph (a) of this section shall perform the following duties as appropriate:

(1) Maintain a program designed to locate capable small business sources for current and future acquisitions;

(2) Coordinate inquiries and requests for advice from small business concerns on acquisition matters;

(3) Review all proposed solicitations in excess of the simplified acquisition threshold, assure that small business concerns will be afforded an equitable opportunity to compete, and, as appropriate, initiate recommendations for small business set-asides, or offers of requirements to the Small Business Administration (SBA) for the 8(a) program, and complete EPA Form 1900–37, "Record of Procurement Request Review," as appropriate;

(4) Take action to assure the availability of adequate specifications and drawings, when necessary, to obtain small business participation in an acquisition. When small business concerns cannot be given an opportunity on a current acquisition, initiate action, in writing, with appropriate technical and contracting personnel to ensure that necessary specifications and/or drawings for future acquisitions are available;

(5) Review proposed contracts for possible breakout of items or services suitable for acquisition from small business concerns;

(6) Participate in the evaluation of a prime contractor's small business subcontracting programs;

(7) Assure that adequate records are maintained, and accurate reports prepared, concerning small business participation in acquisition programs;

(8) Make available to SBA copies of solicitations when so requested;

(9) Act as liaison with the appropriate SBA office or representative in connection with matters concerning the small business programs including set-asides.

1519.202–5 [Reserved]

1519.203 Mentor-protégé.

(a) The contracting officer shall insert the clause at 1552.219–70, *Mentor-Protégé Program,* in all contracts under which the contractor has been approved to participate in the EPA Mentor-Protégé Program.

(b) The contracting officer shall insert the provision at 1552.219–71, *Procedures for Participation in the EPA Mentor-Protégé Program,* in all solicitations valued at $500,000 or more which will be cost-plus-award-fee or cost-plus fixed-fee contracts.

1519.204 [Reserved]

Subpart 1519.5—Set-Asides for Small Business

1519.501 Review of acquisitions.

(a) If no Small Business Administration (SBA) representative is available, the Small Business Specialist (SBS) shall initiate recommendations to the contracting officer for small business set-asides with respect to individual acquisitions or classes of acquisitions or portions thereof.

(b) When the SBS has recommended that all, or a portion, of an individual acquisition or class of acquisitions be set aside for small business, the contracting officer shall:

(1) Promptly concur in the recommendation; or

(2) Promptly disapprove the recommendation, stating in writing the reasons for disapproval. If the contracting officer disapproves the recommendation of the SBS, the SBS may appeal to the appropriate appointing authority, whose decision shall be final.

1519.503 Class set-aside for construction.

(a) Each proposed acquisition for construction estimated to cost between $10,000 and $1,000,000 shall be set-aside for exclusive small business participation. Such set-asides shall be considered to be unilateral small business set-asides, and shall be withdrawn in accordance with the procedure of FAR 19.506 only if found not to serve the best interest of the Government.

(b) Small business set-aside preferences for construction acquisitions in excess of $1,000,000 shall be considered on a case-by-case basis.

Subpart 1519.7—The Small Business Subcontracting Program

1519.705–2 Determining the need for a subcontract plan.

One copy of the determination required by FAR 19.705–2(c) shall be placed in the contract file and one copy provided to the Director of the Office of Small Business Programs.

1519.705–4 Reviewing the subcontracting plan.

In determining the acceptability of a proposed subcontracting plan, the contracting officer shall obtain advice and recommendations from the Office of Small Business Programs, which shall in turn coordinate review by the Small Business Administration Procurement Center Representative (if any).

1519.705–70 Synopsis of contracts containing Pub. L. 95–507 subcontracting plans and goals.

The synopsis of contract award, where applicable, shall include a statement identifying the contract as one containing Public Law 95–507 subcontracting plans and goals.

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 2. The authority citation for part 1552 continues to read as follows:

Authority: 5 U.S.C 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 3. Revise section 1552.219–70 to read as follows:

1552.219–70 Mentor-Protégé Program.

As prescribed in 1519.203(a), insert the following clause:

Mentor-Protégé Program (JUL 2016)

(a) The Contractor has been approved to participate in the EPA Mentor-Protégé Program. The purpose of the Program is to increase the participation of small disadvantaged businesses (SDBs) as subcontractors, suppliers, and ultimately as prime contractors; establish a mutually beneficial relationship with SDBs and EPA's large business prime contractors (although small businesses may participate as Mentors); develop the technical and corporate administrative expertise of SDBs which will ultimately lead to greater success in competition for contract opportunities; promote the economic stability of SDBs; and aid in the achievement of goals for the use of SDBs in subcontracting activities under EPA contracts.

(b) The Contractor shall submit an executed Mentor-Protégé agreement to the Contracting Officer, with a copy to the Office of Small Business Programs (OSBP) or the Small Business Specialist, within thirty (30) calendar days after the effective date of the contract. The Contracting Officer will notify the Contractor within thirty (30) calendar days from its submission if the agreement is not accepted.

(c) The Contractor as a Mentor under the Program agrees to fulfill the terms of its agreement(s) with the Protégé firm(s).

(d) If the Contractor or Protégé firm is suspended or debarred while performing under an approved Mentor-Protégé agreement, the Contractor shall promptly give notice of the suspension or debarment to the OSBP and the Contracting Officer.

(e) Costs incurred by the Contractor in fulfilling their agreement(s) with the Protégé firm(s) are not reimbursable on a direct basis under this contract.

(f) In an attachment to Individual Subcontract Reports (ISR), the Contractor shall report on the progress made under their Mentor-Protégé agreement(s), providing:

(1) The number of agreements in effect; and

(2) The progress in achieving the developmental assistance objectives under each agreement, including whether the objectives of the agreement have been met, problem areas encountered, and any other appropriate information.

(End of clause)

■ 4. Revise section 1552.219–71 to read as follows:

1552.219–71 Procedures for Participation in the EPA Mentor-Protégé Program.

As prescribed in 1519.203(b), insert the following provision:

Procedures for Participation in the EPA Mentor-Protégé Program (JUL 2016)

(a) This provision sets forth the procedures for participation in the EPA Mentor-Protégé Program (hereafter referred to as the Program). The purpose of the Program is to increase the participation of concerns owned and/or controlled by socially and economically disadvantaged individuals as subcontractors, suppliers, and ultimately as prime contractors; to establish a mutually beneficial relationship between these concerns and EPA's large business prime contractors (although small businesses may participate as Mentors); to develop the technical and corporate administrative expertise of these concerns, which will ultimately lead to greater success in competition for contract opportunities; to promote the economic stability of these concerns; and to aid in the achievement of goals for the use of these concerns in subcontracting activities under EPA contracts. If the successful offeror is accepted into the Program they shall serve as a Mentor to a Protégé firm(s), providing developmental assistance in accordance with an agreement with the Protégé firm(s).

(b) To participate as a Mentor, the offeror must receive approval in accordance with paragraph (h) of this section.

(c) A Protégé must be a concern owned and/or controlled by socially and economically disadvantaged individuals within the meaning of section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. 637(a)(5) and (6)), including historically black colleges and universities. Further, in accordance with Public Law 102–389 (the 1993 Appropriation Act), for EPA's contracting purposes, economically and socially disadvantaged individuals shall be deemed to include women.

(d) Where there may be a concern regarding the Protégé firm's eligibility to participate in the program, the protégé's eligibility will be determined by the contracting officer after the SBA has completed any formal determinations.

(e) The offeror shall submit an application in accordance with paragraph (k) of this section as part of its proposal which shall include as a minimum the following information.

(1) A statement and supporting documentation that the offeror is currently performing under at least one active Federal contract with an approved subcontracting plan and is eligible for the award of Federal contracts;

(2) A summary of the offeror's historical and recent activities and accomplishments under any disadvantaged subcontracting programs. The offeror is encouraged to include any initiatives or outreach information believed pertinent to approval as a Mentor firm;

(3) The total dollar amount (including the value of all option periods or quantities) of EPA contracts and subcontracts received by the offeror during its two preceding fiscal years. (Show prime contracts and subcontracts separately per year);

(4) The total dollar amount and percentage of subcontract awards made to all concerns owned and/or controlled by disadvantaged individuals under EPA contracts during its two preceding fiscal years.

(5) The number and total dollar amount of subcontract awards made to the identified Protégé firm(s) during the two preceding fiscal years (if any).

(f) In addition to the information required by paragraph (e) of this section, the offeror shall submit as a part of the application the following information for each proposed Mentor-Protégé relationship:

(1) Information on the offeror's ability to provide developmental assistance to the identified Protégé firm and how the assistance will potentially increase contracting and subcontracting opportunities for the Protégé firm.

(2) A letter of intent indicating that both the Mentor firm and the Protégé firm intend to enter into a contractual relationship under which the Protégé will perform as a subcontractor under the contract resulting from this solicitation and that the firms will negotiate a Mentor-Protégé agreement. The letter of intent must be signed by both parties and contain the following information:

(i) The name, address and phone number of both parties;

(ii) The Protégé firm's business classification, based upon the NAICS code(s) which represents the contemplated supplies or services to be provided by the Protégé firm to the Mentor firm;

(iii) A statement that the Protégé firm meets the eligibility criteria;

(iv) A preliminary assessment of the developmental needs of the Protégé firm and the proposed developmental assistance the Mentor firm envisions providing the Protégé. The offeror shall address those needs and how their assistance will enhance the Protégé. The offeror shall develop a schedule to assess the needs of the Protégé and establish criteria to evaluate the success in the Program;

(v) A statement that if the offeror or Protégé firm is suspended or debarred while performing under an approved Mentor-Protégé agreement the offeror shall promptly give notice of the suspension or debarment to the EPA Office of Small Business Programs (OSBP) and the Contracting Officer. The statement shall require the Protégé firm to notify the Contractor if it is suspended or debarred.

(g) The application will be evaluated on the extent to which the offeror's proposal addresses the items listed in paragraphs (e) and (f) of this section. To the maximum extent possible, the application should be limited to not more than 10 single pages, double spaced. The offeror may identify more than one Protégé in its application.

(h) If the offeror is determined to be in the competitive range, or is awarded a contract without discussions, the offeror will be advised by the Contracting Officer whether their application is approved or rejected. The Contracting Officer, if necessary, may request additional information in connection with the offeror's submission of its revised or best and final offer. If the successful offeror has submitted an approved application, they shall comply with the clause titled "Mentor-Protégé Program."

(i) Subcontracts of $1,000,000 or less awarded to firms approved as Protégés under the Program are exempt from the requirements for competition set forth in FAR 44.202–2(a)(5), and 52.244–5(b). However, price reasonableness must still be determined and the requirements in FAR 44.202–2(a)(8) for cost and price analysis continue to apply.

(j) Costs incurred by the offeror in fulfilling their agreement(s) with a Protégé firm(s) are not reimbursable as a direct cost under the contract. Unless EPA is the responsible audit agency under FAR 42.703–1, offerors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates. Where EPA is the responsible audit agency, these costs will be considered in determining indirect cost rates.

(k) *Submission of Application and Questions Concerning the Program.* The application for the Program shall be submitted to the Contracting Officer, and to the EPA Office of Small Business Programs at the following address: Socioeconomic Business Program Officer, Office of Small Business Programs, U.S. Environmental Protection Agency, William Jefferson Clinton Building (1230T), 1200 Pennsylvania Avenue NW., Washington, DC 20460, Telephone: (202) 566–2075, *Fax:* (202) 565–2473.

(End of provision)

1552.219–72 through 1552.219–74 [Removed and Reserved]

■ 5. Remove and reserve sections 1552.219–72, 1552.219–73, and 1552.219–74.

[FR Doc. 2016–11378 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 81, No. 93
Friday, May 13, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 29

[DHS–2016–0032]

RIN 1601–AA77

Updates to Protected Critical Infrastructure Information Program

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Notice of public meeting.

SUMMARY: The Department of Homeland Security (DHS) invites public comment on the Advanced Notice of Proposed Rulemaking (ANPRM) to update its regulation "Procedures for Handling Critical Infrastructure Information". These comments may be used for potential revisions to the current regulation to strengthen and align the language to support the evolving needs of the critical infrastructure community and the cyber landscape.

DATES: A series of listening sessions will be held on:

1. May 12, 2016 10:00 a.m. to 12:30 p.m. EST and 2:00 p.m. to 4:30 p.m. EST
2. May 17, 2016 10:00 a.m. to 12:30 p.m. EST and 2:00 p.m. to 4:30 p.m. EST
3. May 19, 2016 10:00 a.m. to 12:30 p.m. EST and 2:00 p.m. to 4:30 p.m. EST

Written comments must be submitted on or before Wednesday, July 20, 2016.

ADDRESSES: The listening sessions will be held at:

- 1310 North Courthouse Road, 6th Floor, Arlington, VA 22201.

You may submit comments, identified by docket number DHS–2016–0032. To avoid duplication, please use only one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* U.S. Department of Homeland Security, National Protection and Progra.m.s Directorate, Office of Infrastructure Protection, Infrastructure Information Collection Division, 245 Murray Lane SW., Mail Stop 0602, Washington, DC 20528–0602.
- *In person:* Verbal comments are acceptable in person at the public listening sessions.

FOR FURTHER INFORMATION CONTACT: Emily R. Hickey, Deputy Progra.m. Manager, by phone at (703) 235–9522 or by mail at Protected Critical Infrastructure Information Program, Office of Infrastructure Protection, Infrastructure Information Collection Division, 245 Murray Lane SW., Mail Stop 0602, Washington, DC 20528–0602.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

ANPRM—Advance Notice of Proposed Rulemaking
CFR—Code of Federal Regulations
CII—Critical Infrastructure Information
CII Act of 2002—Critical Infrastructure Information Act of 2002
DHS—Department of Homeland Security
PCII—Protected Critical Infrastructure Information

I. Background

DHS receives sensitive information about the nation's critical infrastructure through its congressionally-mandated PCII Program. The PCII Program provides a secure environment for the private sector, government analysts, and other subject matter experts to share information that is vital to addressing concerns across all critical infrastructure sectors. The Critical Infrastructure Information Act of 2002 (Secs. 211–215, Title II, Subtitle B of the Homeland Security Act of 2002, Pub. L. 107–296) (CII Act of 2002) established the PCII Program, which assures owners and operators that the information they voluntarily submit is protected from public disclosure. In accordance with the CII Act of 2002, on September 1, 2006, DHS issued the PCII Program Final Rule (71 FR 52271, codified at 6 CFR part 29). This rule established procedures that govern the receipt, validation, handling, storage, marking, and use of critical infrastructure information voluntarily submitted to DHS. The procedures are applicable to all Federal, State, local, tribal, and territorial government agencies and contractors that have access to, handle, use, or store critical infrastructure information that enjoy protection under the CII Act of 2002. After 10 years of operation, changes are needed to transition the managing of submissions, access, use, dissemination and safeguarding of PCII to state of the art technology that operates within an electronic environment.

II. Scope of Listening Sessions

DHS is interested in obtaining recommendations for program modifications, particularly in subject matter areas that have developed significantly since the issuance of the initial rule; however, DHS has particular interest in hearing comments regarding: (1) Automated submissions and an expansion of categorical inclusions, (2) marking PCII, (3) sharing PCII with foreign governments, (4) regulatory access, (5) safeguarding, (6) oversight and compliance, (7) alignment with other information protection programs, and (8) the administration of PCII at the State, local, tribal, and territorial level.

Additionally, DHS seeks comment on the economic impact of transitioning the PCII Program to a preferred electronic environment that: (1) Enhances the submission and validation process for critical infrastructure information, (2) uses state of the art technology for an automated interface for quicker access and dissemination of PCII, (3) modifies requirements for the express and certification statements; (4) expands the use of categorical inclusions; (5) requires portion marking of PCII; and (6) implements specific methods to capture and deliver metadata to the PCII Program.

III. Written Comments

A. In General

DHS invites all interested persons, even those who are unable to attend the listening sessions, to submit written comments, data, or views on how the current PCII Program regulations, codified at 6 CFR part 29, "Procedures for Handling Critical Infrastructure Information," might be improved. Comments that would be most helpful to DHS include the questions and answers identified in Part II of this document. Please explain the reason for any comments with available data, and include other information or authority that supports such comments. DHS encourages interested parties to provide specific data that documents the potential costs of modifying the existing rule requirements pursuant to the commenter's suggestions; the potential quantifiable benefits including security and societal benefits of modifying the existing regulatory requirements; and the potential impacts on small entities of modifying the existing regulatory requirements.

Written comments may be submitted electronically or by mail, as explained previously in the **ADDRESSES** section of this ANPRM. To avoid duplication, please use only one of these methods to submit written comments.

Except as provided below, all comments received, as well as pertinent background documents, will be posted without change to *http://www.regulations.gov,* including any personal information provided.

B. Handling of Proprietary or Business Sensitive Information

Interested parties are encouraged to submit comments in a manner that avoids discussion of trade secrets, confidential commercial or financial information, CII or PCII, or any other category of sensitive information that should not be disclosed to the general public. If it is not possible to avoid such discussion, however, please specifically identify any confidential or sensitive information contained in the comments with appropriate warning language (*e.g.,* any PCII must be marked and handled in accordance with the requirements of 6 CFR part 29 §§ 29.5–29.7) and submit them by mail to the PCII Program Manager listed in the **FOR FURTHER INFORMATION CONTACT** section.

DHS will not place any confidential or sensitive comments in the public docket; rather, DHS will handle them in accordance with applicable safeguards and restrictions on access. *See, e.g.,* 6 CFR part 29 §§ 29.5–29.7. *See also* the DHS PCII Procedures Manual ("Protected Critical Infrastructure Information Program," April 2009, located on the DHS Web site at *www.dhs.gov/protected-critical-infrastructure-information-pcii-program*). DHS will hold any such comments in a separate file to which the public does not have access, and place a note in the public docket that DHS has received such materials from the commenter. DHS will provide appropriate access to such comments upon request to individuals who meet the applicable legal requirements for access of such information.

IV. Listening Sessions

A. Purpose

DHS will hold listening sessions on how the current PCII Program regulations, codified at 6 CFR part 29, "Procedures for Handling Critical Infrastructure Information," might be improved.

B. Procedures and Participation

These meetings are open to the public. The listening sessions will be made available online via webinar and can be accessed through the following link, *https://share.dhs.gov/pcii-training/*, at the beginning of each listening session. Additionally, there will be a conference bridge made available so members of the public can dial into the listening sessions for audio. The conference bridge phone number for all the 10:00 a.m. to 12:30 p.m. EST listening sessions is 1–800–369–1912 followed by entering the participant passcode: 3922843. The conference bridge phone number for all the 2:00 p.m. to 4:30 p.m. EST listening sessions is 1–888–790–1952 followed by entering the participant passcode: 1933978. There are no fees to attend any of the listening sessions. DHS will do its best to accommodate all persons who wish to make a comment during the listening sessions. DHS encourages persons and groups having similar interests to consolidate their information for presentation through a single representative.

The listening sessions are intended for technical experts, who have a cyber, security, regulatory or other background to discuss the proposed topics regarding updates to the PCII Program at an expert level. However, individuals who are not technical experts (or who do not meet the other criteria) may still attend and participate in the meeting. The listening sessions are intended to afford the public an opportunity to provide comments to DHS concerning the PCII Program and updating its current regulation. For the listening sessions, comments are requested not to exceed four minutes at a time to enable all interested attendees an opportunity to provide comment. Should time permit, commenters who need additional time may be invited to complete their comments. The listening sessions may adjourn early if all commenters present have had the opportunity to speak prior to the scheduled conclusion of the session. Participants who speak will be asked to provide their name, title, company and stakeholder segment. The listening sessions will be recorded to support the note-taking effort. Notes from the listening sessions, including the webinar materials, will be posted at *http://www.regulations.gov.* DHS will place a transcript of the listening sessions in the docket for this rulemaking.

Tammy Barbour,

Protected Critical Infrastructure Information, (PCII) Program Manager, Infrastructure, Information Collection Division.

[FR Doc. 2016–11338 Filed 5–10–16; 4:15 pm]

BILLING CODE 9110–9P–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6665; Directorate Identifier 2015–NM–070–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes. This proposed AD was prompted by an aileron-wing flutter analysis finding that when a hydraulic aileron actuator is not powered, while at least one aileron flutter damper is inoperative (latent failure), the maximum speed currently defined in the airplane flight manual (AFM) is insufficient to meet the required safety margin. This proposed AD would require revising the AFM to include procedures to follow in the event of a hydraulic system failure and abnormal flight control behavior. We are proposing this AD to ensure that the flightcrew has procedures to follow in the event of a hydraulic system failure and abnormal flight control behavior. If not corrected, this condition could lead to aileron flutter and possible reduced control of the airplane.

DATES: We must receive comments on this proposed AD by June 27, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88–6280–350; fax +31 (0)88–6280–111; email *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6665; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 253–227–1137; fax 253–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6665; Directorate Identifier 2015–NM–070–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0078, dated May 6, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes. The MCAI states:

> In the frame of a complementary aileron-wing flutter analysis performed by Fokker Services, it has been found that in case a hydraulic aileron actuator is not powered, while at least one aileron flutter damper is inoperative (latent failure), the maximum speed currently defined in the Airplane Flight Manual (AFM) is insufficient to meet the required safety margin.
>
> This condition, if not corrected, could lead to aileron flutter, possibly resulting in reduced control of the aeroplane.
>
> To address this potential unsafe condition, Fokker Services published an AFM change through Manual Change Notification—Operational (MCNO) F100–066 which introduces an additional step in the Abnormal Procedures for [a] hydraulic [system] failure and for abnormal flight control behaviour. This new step consists in a speed reduction to Vra (IAS 250kt/M 0.65) to restore a sufficient margin to the flutter speed.
>
> For the reasons described above, this [EASA] AD requires incorporation of the amended abnormal procedures into the applicable AFM.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6665.

Related Service Information Under 1 CFR Part 51

Fokker Services B.V. has issued Fokker 70/100 Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014. The service information contains amendments to applicable AFMs that introduce an additional step in the abnormal procedures for a hydraulic system failure and abnormal flight control behavior. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Costs of Compliance

We estimate that this proposed AD affects 8 airplanes of U.S. registry.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $680, or $85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Fokker Services B.V.: Docket No. FAA–2016–6665; Directorate Identifier 2015–NM–070–AD.

(a) Comments Due Date

We must receive comments by June 27, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Fokker Services B.V. Model F28 Mark 0070 and 0100 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Reason

This AD was prompted by an aileron-wing flutter analysis finding that when a hydraulic aileron actuator is not powered, while at least one aileron flutter damper is inoperative (latent failure), the maximum speed currently defined in the airplane flight manual (AFM) is insufficient to meet the required safety margin. We are proposing this AD to ensure that the flightcrew has procedures to follow in the event of a hydraulic system failure and abnormal flight control behavior. If not corrected, this condition could lead to aileron flutter and possible reduced control of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) AFM Revision

Within 12 months after the effective date of this AD, revise the Abnormal Procedures and Limitations sections of the applicable AFM to include the information in Fokker 70/100 Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014. This may be accomplished by inserting a copy of Fokker 70/100 Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014, into the applicable AFM. Fokker 70/100 Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014, introduces procedures for the flightcrew to follow in the event of a hydraulic system failure and abnormal flight control behavior. When the information in Fokker 70/100 Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014, is included in the general revisions of the AFM, the general revisions may be inserted in the AFM, and Fokker Manual Change Notification—Operational Documentation MCNO F100–066, dated December 1, 2014, may be removed.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Fokker B.V. Service's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2015–0078, dated May 6, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6665.

(2) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone +31 (0)88–6280–350; fax +31 (0)88–6280–111; email *technicalservices@fokker.com;* Internet *http://www.myfokkerfleet.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 4, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11172 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6667; Directorate Identifier 2015–NM–125–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2009–21–01, which applies to certain Boeing Model 737–300 and 737–400 series airplanes. AD 2009–21–01 currently requires repetitive inspections to detect cracking of the aft fuselage skin, and related investigative and corrective actions if necessary. Since we issued AD 2009–21–01, an evaluation by the design approval holder (DAH) indicates that the aft fuselage skin is subject to widespread fatigue damage (WFD). This proposed AD would add new aft fuselage skin inspections for cracking, inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers, permanent repairs of time-limited repairs, related investigative and corrective actions if necessary, and skin panel replacement. The proposed AD also removes Model 737–400 series airplanes from the applicability. We are proposing this AD to detect and correct cracking in the aft fuselage skin along the longitudinal edges of the bonded skin doubler, which could result in possible rapid decompression and reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by June 27, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6667.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6667; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6667; Directorate Identifier 2015–NM–125–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Fatigue damage can occur locally, in small areas or structural design details, or globally, in widespread areas. Multiple-site damage is widespread damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Widespread damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site damage and multiple-element damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane. This condition is known as widespread fatigue damage. It is associated with general degradation of large areas of structure with similar structural details and stress levels. As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

On September 25, 2009, we issued AD 2009–21–01, Amendment 39–16038 (74 FR 52395, October 13, 2009) ("AD 2009–21–01"), for certain Boeing Model 737–300 and 737–400 series airplanes. AD 2009–21–01 requires repetitive inspections to detect cracking of the aft fuselage skin, and related investigative and corrective actions if necessary. AD 2009–21–01 resulted from reports of cracks in the aft fuselage skin on both sides of the airplane. We issued AD 2009–21–01 to detect and correct cracking in the aft fuselage skin along the longitudinal edges of the bonded skin doubler, which could result in reduced structural integrity of the airplane.

Actions Since AD 2009–21–01 Was Issued

Since we issued AD 2009–21–01, additional cracks have been found on airplanes in the skin panels from station 727 to station 1016 and from stringer S–14 to stringer S–25 on the left and right sides of the airplanes. Cracks at fastener holes in the bonded doubler have also been reported on several airplanes in the area above stringer S–17 on the left and right side of the airplanes.

An evaluation by the DAH indicates that the aft fuselage skin is subject to WFD. On the existing skin panel assemblies, the doubler is chemically milled to create pockets of various depths. At these skin panel locations on the airplane, the loads could cause a condition where cracks could form along the longitudinal edges of the doubler.

AD 2009–21–01 applies to certain Boeing Model 737–300 and 737–400 series airplanes. This proposed AD is applicable to certain Model 737–300 series airplanes. We are considering issuing additional rulemaking that will apply to Model 737–400 series airplanes. We have determined that, in this case, a less burdensome approach is to issue separate ADs applicable only to each model type.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015. The service information describes procedures for doing inspections of the fuselage skin, repairs, and skin panel replacement. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2009–21–01, this proposed AD would retain all of the requirements of AD 2009–21–01 for Model 737–300 series airplanes, except the skin panel replacement is terminating action only if the skin panel replacement is done with a production skin panel after 53,000 total flight cycles. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraphs (g) and (h) of this proposed AD. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between this Proposed AD and the Service Information." For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6667.

The phrase "related investigative actions" is used in this proposed AD. "Related investigative actions" are follow-on actions that (1) are related to the primary action, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase "corrective actions" is used in this proposed AD. "Corrective actions" are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, specifies to contact the manufacturer for instructions on how to repair certain conditions and also to obtain certain work instructions, but this proposed AD would require repairing those conditions and also to obtain those work instructions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Table 6 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, specifies post-repair airworthiness limitation inspections in compliance with 14 CFR 25.571(a)(3) at the repaired locations, which support compliance with 14 CFR 121.1109(c)(2) or 129.109(b)(2). As airworthiness limitations, these inspections are required by maintenance and operational rules. It is therefore unnecessary to mandate them in this AD. Deviations from these inspections require FAA approval, but do not require an alternative method of compliance. This difference has been coordinated with Boeing.

Explanation of Compliance Time

The compliance time for the modification specified in this proposed AD for addressing WFD was established to ensure that discrepant structure is modified before WFD develops in airplanes. Standard inspection techniques cannot be relied on to detect WFD before it becomes a hazard to flight. We will not grant any extensions of the compliance time to complete any AD-mandated service bulletin related to WFD without extensive new data that would substantiate and clearly warrant such an extension.

Costs of Compliance

We estimate that this proposed AD affects 168 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	Up to 1,791 work-hours × $85 per hour = $152,235	$0	Up to $152,235	Up to $25,575,480.
Skin replacement	624 work-hours × $85 per hour = $53,040	$98,275	$151,315	$25,420,920.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspections. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Time limited repair	24 work-hours × $85 per hour = $2,040 per repair	[1]	$2,040 per repair.
Permanent repair	Up to 43 work-hours × $85 per hour = $3,655 per repair	[1]	Up to $3,655 per repair.

[1] We have received no definitive data that would enable us to provide the part cost estimates for the on-condition actions specified in this proposed AD.

We estimate the following costs to do any necessary post-repair inspections that would be required. We have no way of determining the number of aircraft that might need these inspections:

POST-REPAIR INSPECTION COSTS

Action	Labor cost	Parts cost	Cost per product
Post-repair inspection	Up to 7 work-hours × $85 per hour = $595	$0	Up to $595.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2009–21–01, Amendment 39–16038 (74 FR 52395, October 13, 2009), and adding the following new AD:

The Boeing Company: Docket No. FAA–2016–6667; Directorate Identifier 2015–NM–125–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by June 27, 2016.

(b) Affected ADs

This AD replaces AD 2009–21–01, Amendment 39–16038 (74 FR 52395, October 13, 2009) ("AD 2009–21–01").

(c) Applicability

This AD applies to Boeing Model 737–300 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder (DAH) indicates that the aft fuselage skin is subject to widespread fatigue damage (WFD). We are issuing this AD to detect and correct cracking in the aft fuselage skin along the longitudinal edges of the bonded skin doubler, which could result in possible rapid decompression and reduced structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspections, Related Investigative and Corrective Actions

At the applicable times specified in tables 1 and 2 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(1) and (h)(2) of this AD: Do the applicable inspections to detect cracks in the aft fuselage skin panels; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraphs (h)(3) and (h)(4) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in tables 1 and 2 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015. Accomplishment of a repair in accordance with "Part 4: Repair" of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD, is terminating action for the repetitive inspections required by this paragraph at the repaired locations only.

(h) Exceptions to Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, Dated June 3, 2015

(1) Where Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, specifies compliance times "after the Revision 4 date of this service bulletin," this AD requires compliance within the specified compliance times after the effective date of this AD.

(2) The Condition column of Paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, refers to airplanes in certain configurations as of the "issue date of Revision 4 of this service bulletin." However, this AD applies to airplanes in the specified configurations "as of the effective date of this AD."

(3) Where Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, specifies contacting Boeing for repair instructions or work instructions, before further flight, repair or perform the work instructions using a method approved in accordance with the procedures specified in paragraph (n) of this AD, except as required by paragraph (h)(4) of this AD.

(4) For airplanes on which an operator has a record that a skin panel was replaced with a production skin panel before 53,000 total flight cycles: At the applicable time for the next inspection as specified in tables 1 and 2 of paragraph 1.E., "Compliance," Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as provided by paragraph (h)(1) and (h)(2) of this AD: Perform inspections and applicable corrective actions using a method approved in accordance with the procedures specified in paragraph (n) of this AD.

(i) Actions for Airplanes With a Time Limited Repair Installed

(1) For airplanes with a time limited repair installed as specified in Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006: At the applicable times specified in table 3 of paragraph 1.E., "Compliance," of Boeing Special Attention

Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as provided by paragraphs (h)(1) and (h)(2) of this AD: Do the actions specified in paragraphs (i)(1)(i) and (i)(1)(ii) of this AD.

(i) Do the applicable inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015.

(ii) Make the time limited repair permanent; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the permanent repair required by this paragraph terminates the inspections required by paragraph (i)(1)(i) of this AD for the permanently repaired area only.

(2) For airplanes with a time limited repair installed as specified in Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015: At the applicable times specified in table 4 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015: Do the actions specified in paragraphs (i)(2)(i) and (i)(2)(ii) of this AD.

(i) Do the applicable inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in table 4 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015.

(ii) Make the time limited repair permanent; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the permanent repair required by this paragraph terminates the inspections required by paragraph (i)(2)(i) of this AD for the permanently repaired area only.

(j) Modification of Certain Permanent Repairs

For airplanes with an existing time limited repair that was made permanent as specified in Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006: At the applicable times specified in table 5 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as provided by paragraphs (h)(1) of this AD: Modify the existing permanent repair; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight.

(k) Post-Repair Inspections

Table 6 of paragraph 1.E., "Compliance," of Boeing Service Bulletin Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015, specifies post-repair airworthiness limitation inspections in compliance with 14 CFR 25.571(a)(3) at the repaired locations, which support compliance with 14 CFR 121.1109(c)(2) or 129.109(b)(2). As airworthiness limitations, these inspections are required by maintenance and operational rules. It is therefore unnecessary to mandate them in this AD. Deviations from these inspections require FAA approval, but do not require an alternative method of compliance.

(l) Skin Panel Replacement

At the later of the times specified in paragraphs (l)(1) and (1)(2) of this AD: Replace the applicable skin panels, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1168, Revision 4, dated June 3, 2015. Do all applicable related investigative and corrective actions before further flight. Doing the skin panel replacement required by this paragraph terminates the inspection requirements of paragraphs (g), (i), and (j) of this AD for that skin panel only, provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles.

(1) Before 60,000 total flight cycles, but not before 53,000 total flight cycles.

(2) Within 6,000 flight cycles after the effective date of this AD, but not before 53,000 total flight cycles.

(m) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006, except as required by paragraph (h)(4) of this AD. Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006, was incorporated by reference in AD 2009–21–01.

(2) This paragraph provides credit for the actions required by paragraph (l) of this AD, if those actions were performed before the effective date of this AD using Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006, except as required by paragraph (h)(4) of this AD; provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles. Boeing Service Bulletin 737–53–1168, Revision 3, dated November 28, 2006, was incorporated by reference in AD 2009–21–01.

(3) This paragraph provides credit for the actions required by paragraph (l) of this AD, if those actions were performed before November 17, 2009 (the effective date of AD 2009–21–01), using any service information specified in paragraphs (m)(3)(i), (m)(3)(ii), and (m)(3)(iii) of this AD, except as required by paragraph (h)(4) of this AD; provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles. The service information specified in paragraphs (m)(3)(i), (m)(3)(ii), and (m)(3)(iii) of this AD are not incorporated by reference in this AD.

(i) Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 737–53–1168, dated March 16, 1995.

(ii) Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 737–53–1168, Revision 1, dated August 17, 1995.

(iii) Part 3 of the Accomplishment Instructions of Boeing Service Bulletin 737–53–1168, Revision 2, dated November 27, 1996.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (o)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(4) AMOCs approved previously for repairs for AD 2009–21–01 are approved as AMOCs for the corresponding provisions of paragraph (g) of this AD.

(5) AMOCs approved for previous modifications done as optional terminating action for AD 2009–21–01 are approved as AMOCs for the modification required by paragraph (l) of this AD provided the previous modification was done after the

airplane had accumulated 53,000 total flight cycles or more.

(o) Related Information

(1) For more information about this AD, contact Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 4, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11170 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6668; Directorate Identifier 2014–NM–149–AD]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Saab Aeronautics (Type Certificate Previously Held by Saab AB, Saab Aerosystems) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Saab AB, Saab Aeronautics Model SAAB 2000 airplanes. This proposed AD was prompted by a report that on some airplanes, during the paint removal process for repainting the airplane, the basic corrosion protection (anodizing and primer) coating was sanded down to bare metal on the aluminum skin panels and the bare metal might not have been treated correctly for corrosion prevention. This proposed AD would require an inspection of structural components of the airplane for any damaged protective coating; inspections of those areas for pitting corrosion, if necessary; a thickness measurement to determine if there is reduced skin thickness, if necessary; and repair, if necessary. We are proposing this AD to detect and correct damaged protective coatings. This condition could result in pitting corrosion damage; and reduced metal thickness, which could result in reduced static and fatigue strength of the airplane's structural parts.

DATES: We must receive comments on this proposed AD by June 27, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Saab AB, Saab Aeronautics, SE–581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; email *saab2000.techsupport@saabgroup.com;* Internet *http://www.saabgroup.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6668; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6668; Directorate Identifier 2014–NM–149–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2014–0160, dated July 9, 2014 (Correction: July 9, 2014) (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for certain Saab AB, Saab Aeronautics Model SAAB 2000 airplanes. The MCAI states:

> SAAB received evidence that on a number of SAAB 2000 aeroplanes, during paint removal before repainting, the basic corrosion protection anodizing and primer were removed. In these cases, the basic corrosion protection coating was sanded down to bare metal on the aluminium [aluminum] skin panel in spite of existing instruction(s) contained in the Structural Repair Manual (SRM) which prohibit(s) exposing the aluminium bare metal. Due to the fact that the skin panels are manufactured from aluminium without a protective covering (unclad), the anodizing and primer is the corner stone of the aeroplane corrosion protection system. If the anodizing and primer is removed and the aluminium surface is not correctly treated, pitting corrosion may occur. In addition, sanding to bare metal can inadvertently lead to metal removal and subsequently reduce the static and fatigue strength of the aeroplane structural parts.
>
> This condition, if not detected and corrected, could result in corrosion damage and/or reduced structural strength of the aeroplane structure.
>
> To address this potential unsafe condition, SAAB issued SB 2000–51–002 to provide inspection instructions.
>
> For the reasons described above, this [EASA] AD requires a one-time [detailed] inspection [for damage] * * * of required anticorrosion protective coating [*e.g.,* bonding primer], [detailed] inspection for

pitting corrosion (if necessary) [, a dye penetrant inspection for pitting corrosion (if necessary)] and measure the skin thickness (if necessary) [to determine if there is reduced skin thickness] and, depending on findings, corrective action(s) [*e.g.*, repair].

This [EASA] AD is re-issued to correct typographical error of the effective date.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6668.

Relevant Service Information Under 1 CFR Part 51

Saab has issued Service Bulletin 2000–51–002, Revision 01, dated May 23, 2014. This service information describes procedures for an inspection of structural components of the airplane for any damaged protective coating; inspections of those areas for pitting corrosion; a thickness measurement to determine if there is reduced skin thickness; and repair. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

We estimate that this proposed AD affects 8 airplanes of U.S. registry.

We also estimate that it would take about 20 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $13,600, or $1,700 per product.

In addition, we estimate that any necessary follow-on actions would take about 45 work-hours, for a cost of $3,825 per product. We have no way of determining the number of aircraft that might need these actions. We have received no definitive data that would enable us to provide cost estimates for the parts cost of the follow-on actions specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Saab AB, Saab Aeronautics (Type Certificate previously held by Saab AB, Saab Aerosystems): Docket No. FAA–2016–6668; Directorate Identifier 2014–NM–149–AD.

(a) Comments Due Date

We must receive comments by June 27, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Saab AB, Saab Aeronautics (Type Certificate previously held by Saab AB, Saab Aerosystems) Model SAAB 2000 airplanes, certificated in any category, all manufacturer serial numbers, except as specified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Those airplanes identified in Table 1 of Saab Service Bulletin 2000–51–002, Revision 01, dated May 23, 2014, on which an applicable "Related Statement" identified in Table 1 was accomplished.

(2) Those airplanes that either have retained the original paint or have been repainted by Saab AB, Saab Aeronautics.

(d) Subject

Air Transport Association (ATA) of America Code 51, Standard Practices/Structures.

(e) Reason

This AD was prompted by a report that on some airplanes, during the paint removal process for repainting the airplane, the basic corrosion protection (anodizing and primer) coating was sanded down to bare metal on the aluminum skin panels and the bare metal might not have been treated correctly for corrosion prevention. We are issuing this AD to detect and correct damaged protective coatings. This condition could result in pitting corrosion damage; and reduced metal thickness, which could result in reduced static and fatigue strength of the airplane's structural parts.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspection, Related Investigative Actions, and Corrective Action

(1) Within 2,000 flight hours or 12 months, whichever occurs first after the effective date of this AD, do a detailed inspection of the airplane structural parts to detect damaged protective coating (*e.g.*, bonding primer), in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–51–002, Revision 01, dated May 23, 2014. If any damaged protective coating is found, before further flight, do a detailed inspection of the airplane structural parts to detect pitting corrosion and, if no pitting corrosion is found, do a dye penetrant inspection of the airplane structural parts to detect pitting

corrosion and a thickness measurement to determine if there is reduced skin thickness, as applicable, in accordance with the Accomplishment Instructions of Saab Service Bulletin 2000–51–002, Revision 01, dated May 23, 2014.

(2) If, during any inspection required by paragraph (g)(1) of this AD, any damage (such as pitting corrosion or damaged primer) or reduced skin thickness is detected, as defined in Saab Service Bulletin 2000–51–002, Revision 01, dated May 23, 2014, before further flight, contact the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Saab AB, Saab Aeronautics' EASA Design Organization Approval (DOA) for a repair method, and do the repair within the compliance time indicated in those instructions.

(h) Credit for Previous Actions

This paragraph provides credit for actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Saab Service Bulletin 2000–51–002, dated April 9, 2014, which is not incorporated by reference in this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1112; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Saab AB, Saab Aeronautics' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2014–0160, dated July 9, 2014 (Correction: July 9, 2014), for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6668.

(2) For service information identified in this AD, contact Saab AB, Saab Aeronautics, SE–581 88, Linköping, Sweden; telephone +46 13 18 5591; fax +46 13 18 4874; email *saab2000.techsupport@saabgroup.com;* Internet *http://www.saabgroup.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 4, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11171 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6666; Directorate Identifier 2015–NM–124–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 737–400 series airplanes. This proposed AD was prompted by an evaluation by the design approval holder (DAH) which indicates that the aft fuselage skin is subject to widespread fatigue damage (WFD) and reports of aft fuselage skin cracking. This proposed AD would require repetitive inspections to detect cracking of the aft fuselage skin, inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers, permanent repairs of time-limited repairs, related investigative and corrective actions if necessary, and skin panel replacement. We are proposing this AD to detect and correct cracking in the aft fuselage skin along the longitudinal edges of the bonded skin doubler, which could result in possible rapid decompression and reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by June 27, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6666.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6666; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6666; Directorate Identifier 2015–NM–124–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Fatigue damage can occur locally, in small areas or structural design details, or globally, in widespread areas. Multiple-site damage is widespread damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Widespread damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site damage and multiple-element damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane. This condition is known as widespread fatigue damage. It is associated with general degradation of large areas of structure with similar structural details and stress levels. As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

We have received reports of 29 airplanes with skin panel cracking. Cracks were found on airplanes with between 22,500 and 44,600 total airplane cycles. The cracks were found on both the left and the right hand sides of the airplanes between station 727 and station 947 in the skin panels between stringer S–20 and S–25. The cracks ranged in lengths from between 0.25 inches to 5.5 inches.

During certain inspections, additional chem-mill step cracks have been discovered. On the existing skin panel assemblies, the doubler is chemically milled to create pockets of various depths. At these skin panel locations on the airplane, the loads could cause a condition where skin cracks form along the longitudinal edges of the doubler. If not corrected, skin cracks could extend to multiple bays and result in possible rapid decompression and loss of structural integrity of the airplane.

Other Related Rulemaking

On September 25, 2009, we issued AD 2009–21–01, Amendment 39–16038 (74 FR 52395, October 13, 2009) ("AD 2009–21–01"), for certain Boeing Model 737–300 and 737–400 series airplanes. AD 2009–21–01 requires repetitive inspections to detect cracking of the aft fuselage skin, and related investigative/corrective actions if necessary.

We have determined that, in this case, a less burdensome approach is to issue separate ADs applicable only to each model type. Therefore, this proposed AD is applicable to certain Model 737–400 series airplanes. We are considering issuing additional rulemaking that will supersede AD 2009–21–01 and apply to Model 737–300 series airplanes.

Although this proposed AD does not supersede AD 2009–21–01, this proposed AD would retain all of the requirements of AD 2009–21–01 for Model 737–400 series airplanes, except the skin panel replacement is terminating action only if the skin panel replacement is done with a production skin panel after 53,000 total flight cycles. Those requirements are referenced in Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, which, in turn, is referenced in paragraph (g) of this proposed AD.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015. The service information describes procedures for doing inspections of the fuselage skin, repairs, and skin panel replacement. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between this Proposed AD and the Service Information." For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6666.

The phrase "related investigative actions" is used in this proposed AD. "Related investigative actions" are follow-on actions that (1) are related to the primary action, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase "corrective actions" is used in this proposed AD. "Corrective actions" are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, specifies to contact the manufacturer for instructions on how to repair certain conditions and also to obtain certain work instructions, but this proposed AD would require repairing those conditions and also to obtain those work instructions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Table 7 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, specifies post-repair airworthiness limitation inspections in compliance with 14 CFR 25.571(a)(3) at the repaired locations, which support compliance with 14 CFR 121.1109(c)(2) or 129.109(b)(2). As airworthiness limitations, these inspections are required by maintenance and operational rules. It is therefore unnecessary to mandate them in this AD. Deviations from these inspections require FAA approval, but do not require an alternative method of compliance. This difference has been coordinated with Boeing.

Explanation of Compliance Time

The compliance time for the modification specified in this proposed AD for addressing WFD was established to ensure that discrepant structure is modified before WFD develops in airplanes. Standard inspection techniques cannot be relied on to detect WFD before it becomes a hazard to flight. We will not grant any extensions of the compliance time to complete any AD-mandated service bulletin related to WFD without extensive new data that would substantiate and clearly warrant such an extension.

Costs of Compliance

We estimate that this proposed AD affects 84 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections	Up to 1,568 work-hours × $85 per hour = Up to $133,280.	$0	Up to $133,280	Up to $11,195,520.
Skin replacement	698 work-hours × $85 per hour = $59,330	$185,147	$244,477	$20,536,068.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspections. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Time limited repair	24 work-hours × $85 per hour = $2,040 per repair	[1]	$2,040 per repair.
Permanent repair	Up to 39 work-hours × $85 per hour = $3,315 per repair	[1]	Up to $3,315 per repair.

[1] We have received no definitive data that would enable us to provide the part cost estimates for the on-condition actions specified in this proposed AD.

We estimate the following costs to do any necessary post-repair inspections that would be required. We have no way of determining the number of aircraft that might need these inspections:

POST-REPAIR INSPECTION COSTS

Action	Labor cost	Parts cost	Cost per product
Post-repair inspection	Up to 7 work-hours × $85 per hour = $595	$0	Up to $595.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2016–6666; Directorate Identifier 2015–NM–124–AD.

(a) Comments Due Date

We must receive comments by June 27, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Boeing Model 737–400 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder (DAH) which indicates that the aft fuselage skin is subject to widespread fatigue damage (WFD) and reports of aft fuselage skin cracking. We are issuing this AD to detect and correct cracking in the aft fuselage skin along the longitudinal edges of the bonded skin doubler, which could result in possible rapid decompression and reduced structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspections, Related Investigative and Corrective Actions

At the applicable times specified in tables 1, 2, and 3 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as provided by paragraph (h)(1) and (h)(2) of this AD: Do the applicable inspections to detect cracks in the aft fuselage skin panels; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraphs (h)(3) and (h)(4) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in tables 1, 2, and 3 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015. Accomplishment of a repair in accordance with "Part 4: Repair" of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD, is terminating action for the repetitive inspections required by this paragraph at the repaired locations only.

(h) Exceptions to Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, Dated July 10, 2015

(1) Where Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, specifies compliance times "after the Revision 3 date of this service bulletin," this AD requires compliance within the specified compliance times after the effective date of this AD.

(2) The Condition column of Paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, refers to airplanes in certain configurations as of the "issue date of Revision 3 of this service bulletin." However, this AD applies to airplanes in the specified configurations "as of the effective date of this AD."

(3) Where Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, specifies contacting Boeing for repair instructions or work instructions, before further flight, repair or perform the work instructions using a method approved in accordance with the procedures specified in paragraph (n) of this AD, except as required by paragraph (h)(4) of this AD.

(4) For airplanes on which an operator has a record that a skin panel was replaced with a production skin panel before 53,000 total flight cycles: At the applicable time for the next inspection as specified in tables 1, 2, and 3 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as provided by paragraph (h)(1) and (h)(2) of this AD: Perform inspections and applicable corrective actions using a method approved in accordance with the procedures specified in paragraph (n) of this AD.

(i) Actions for Airplanes With a Time Limited Repair Installed

(1) For airplanes with a time limited repair installed as specified in Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007: At the applicable times specified in table 4 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as provided by paragraphs (h)(1) and (h)(2) of this AD: Do the actions specified in paragraphs (i)(1)(i) and (i)(1)(ii) of this AD.

(i) Do the applicable inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in table 4 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015.

(ii) Make the time limited repair permanent; and do all applicable related investigative and corrective actions; in accordance the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the permanent repair required by this paragraph terminates the inspections required by paragraph (i)(1)(i) of this AD for the permanently repaired area only.

(2) For airplanes with a time limited repair installed as specified in Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015: At the applicable times specified in table 5 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as provided by paragraph (h)(2) of this AD: Do the actions specified in paragraphs (i)(2)(i) and (i)(2)(ii) of this AD.

(i) Do the applicable inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers; and do all applicable corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified in table 5 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015.

(ii) Make the time limited repair permanent; and do all applicable related investigative and corrective actions; in accordance the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the permanent repair required by this paragraph terminates the inspections required by paragraph (i)(2)(i) of this AD for the permanently repaired area only.

(j) Modification of Certain Permanent Repairs

For airplanes with an existing time limited repair that was made permanent as specified in Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007: At the applicable time specified in table 6 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as provided by paragraph (h)(1) of this AD: Modify the existing permanent repair; and do all applicable related investigative and corrective actions; in accordance the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight.

(k) Post-Repair Inspections

Table 7 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015, specifies post-repair airworthiness limitation inspections in compliance with 14 CFR 25.571(a)(3) at the repaired locations, which support compliance with 14 CFR 121.1109(c)(2) or 129.109(b)(2). As airworthiness limitations, these inspections are required by maintenance and operational rules. It is therefore unnecessary to mandate them in this AD. Deviations from these inspections require FAA approval, but do not require an alternative method of compliance.

(l) Skin Panel Replacement

At the later of the times specified in paragraphs (l)(1) and (l)(2) of this AD: Replace the applicable skin panels, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1187, Revision 3, dated July 10, 2015. Do all applicable related investigative and corrective actions before further flight. Doing the skin panel replacement required by this paragraph terminates the inspection requirements of paragraphs (g), (i), and (j) of this AD for that skin panel only, provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles.

(1) Before 60,000 total flight cycles, but not before 53,000 total flight cycles.

(2) Within 6,000 flight cycles after the effective date of this AD, but not before 53,000 total flight cycles.

(m) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007, except as required by paragraph (h)(4) of this AD. Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007, was incorporated by reference in AD 2009–21–01, Amendment 39–16038 (74 FR 52395, October 13, 2009) ("AD 2009–21–01").

(2) This paragraph provides credit for the actions required by paragraph (l) of this AD, if those actions were performed before the effective date of this AD using Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007, except as required by paragraph (h)(4) of this AD; provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles. Boeing Service Bulletin 737–53–1187, Revision 2, dated May 9, 2007, was incorporated by reference in AD 2009–21–01.

(3) This paragraph provides credit for the actions required by paragraph (l) of this AD, if those actions were performed before November 17, 2009 (the effective date of AD 2009–21–01) using Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–53–1187, dated November 2, 1995; or Part III of the Accomplishment Instructions of Boeing Service Bulletin 737–53–1187, Revision 1, dated January 16, 1997, except as required by paragraph (h)(4) of this AD; provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles. Boeing Service Bulletin 737–53–1187, dated November 2, 1995; and Boeing Service Bulletin 737–53–1187, Revision 1, dated January 16, 1997; are not incorporated by reference in this AD.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (o)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane and the approval must specifically refer to this AD.

(4) AMOCs approved for repairs for AD 2009–21–01 are approved as AMOCs for the corresponding provisions of paragraph (g) of this AD.

(5) AMOCs approved for previous modifications done as optional terminating action for AD 2009–21–01 are approved as AMOCs for the modification required by paragraph (l) of this AD provided the previous modification was done after the airplane had accumulated 53,000 total flight cycles or more.

(o) Related Information

(1) For more information about this AD, contact Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone: 206–544–5000, extension 1; fax: 206–766–5680; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 4, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11169 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6664; Directorate Identifier 2015–NM–177–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2012–16–07, which applies to certain Boeing Model 737–500 series airplanes. AD 2012–16–07 currently requires inspections of the fuselage skin at the chem-milled steps, and repair if necessary. Since we issued AD 2012–16–07, an evaluation by the design approval holder (DAH) indicates that the fuselage skin is subject to widespread fatigue damage (WFD), and we have received reports of cracks at the chem-milled steps in the fuselage skin. This proposed AD would add new fuselage skin inspections for cracking, inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers, permanent repairs of time-limited repairs, related investigative and corrective actions if necessary, and skin panel replacement. We are proposing this AD to detect and correct cracking on the aft lower lobe fuselage skins, which could result in rapid decompression of the airplane.

DATES: We must receive comments on this proposed AD by June 27, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6664.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6664; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6664; Directorate Identifier 2015–NM–177–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

Fatigue damage can occur locally, in small areas or structural design details, or globally, in widespread areas. Multiple-site damage is widespread damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Widespread damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site damage and multiple-element damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane. This condition is known as widespread fatigue damage. It is associated with general degradation of large areas of structure with similar structural details and stress levels. As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

On July 31, 2012, we issued AD 2012–16–07, Amendment 39–17154 (77 FR 48423, August 14, 2012) ("AD 2012–16–07"), for certain The Boeing Company Model 737–500 series airplanes. AD 2012–16–07 requires inspections of the fuselage skin at the chem-milled steps, and repair if necessary. AD 2012–16–07 resulted from reports of chem-milled steps cracking on the aft lower lobe fuselage skins. We issued AD 2012–16–07 to detect and correct cracking on the aft lower lobe fuselage skins, which could result in rapid decompression of the airplane.

Actions Since AD 2012–16–07 Was Issued

Since we issued AD 2012–16–07, an evaluation by the DAH indicates that the lower lobe skin panels are subject to WFD, and we have received reports of cracks at the chem-milled steps in the fuselage skin.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015. The service information describes procedures for inspection and repair of the fuselage skin panels between station 727 and station 1016, and between stringers S–14 and S–25; and also describes procedures for skin panel replacement. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type designs.

Proposed AD Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2012–16–07, this proposed AD would retain all of the requirements of AD 2012–16–07. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraphs (g) and (h) of this proposed AD.

This proposed AD would also require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between This Proposed AD and the Service Information."

For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6664.

The phrase "related investigative actions" is used in this proposed AD. "Related investigative actions" are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase "corrective actions" is used in this proposed AD. "Corrective actions" are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between This Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, specifies to contact the manufacturer for instructions on how to repair certain conditions and also to obtain certain work instructions, but this proposed AD would require repairing those conditions and also to obtain those work instructions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Explanation of Compliance Time

The compliance time for the replacement specified in this proposed AD for addressing WFD was established to ensure that discrepant structure is replaced before WFD develops in airplanes. Standard inspection techniques cannot be relied on to detect WFD before it becomes a hazard to flight. We will not grant any extensions of the compliance time to complete any AD-mandated service bulletin related to WFD without extensive new data that would substantiate and clearly warrant such an extension.

Costs of Compliance

We estimate that this proposed AD affects 33 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections [actions retained from AD 2012-16-07].	23 work-hours × $85 per hour = $1,955 per inspection cycle.	$0	$1,955 per inspection cycle ...	$64,515 per inspection cycle.
Inspections [new proposed action].	Up to 1,515 work-hours × $85 per hour = $128,775 per inspection cycle.	$0	Up to $128,775 per inspection cycle.	Up to $4,249,575 per inspection cycle.
Skin panel replacement [new proposed action].	688 work-hours × $85 per hour = $58,480.	$96,000	$154,480	$5,097,840.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these repairs:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Time-limited repair	24 work-hours × $85 per hour = $2,040	[1]	$2,040.[1]
Permanent repair	31 work-hours × $85 per hour = $2,635	[1]	$2,635.[1]
Permanent repair inspection	4 work-hours × $85 per hour = $340 per inspection cycle.	[1]	$340 [1] per inspection cycle.

[1] We have received no definitive data that would enable us to provide parts cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2012–16–07, Amendment 39–17154 (77 FR 48423, August 14, 2012), and adding the following new AD:

The Boeing Company: Docket No. FAA–2016–6664; Directorate Identifier 2015–NM–177–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by June 27, 2016.

(b) Affected ADs

This AD replaces AD 2012–16–07, Amendment 39–17154 (77 FR 48423, August 14, 2012) ("AD 2012–16–07").

(c) Applicability

This AD applies to all The Boeing Company Model 737–500 series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder (DAH) that indicates that the fuselage skin is subject to widespread fatigue damage (WFD), and reports of cracks at the chem-milled steps in the fuselage skin. We are issuing this AD to detect and correct cracking on the aft lower lobe fuselage skins, which could result in rapid decompression of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Inspections, Related Investigative and Corrective Actions

At the applicable times specified in table 1 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraphs (h)(1) and (h)(2) of this AD: Do the applicable inspections to detect cracks in the fuselage skin panels; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraphs (h)(3), (h)(4), and (h)(5) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015. Accomplishment of a repair in accordance with "Part 3: Repair" of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraph (h)(3) of this AD, is terminating action for the repetitive inspections required by this paragraph at the repaired locations only.

(h) Exceptions to Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, Dated June 30, 2015

(1) Where Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, specifies compliance times "after the Revision 1 date of this service bulletin," this AD requires compliance within the specified compliance times after the effective date of this AD.

(2) The Condition column of table 1 of Paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, refers to airplanes in certain configurations as of the "issue date of Revision 1 of this service bulletin." However, this AD applies to airplanes in the specified configurations "as of the effective date of this AD."

(3) Where Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, specifies contacting Boeing for repair instructions or work instructions, before further flight, repair or perform the work instructions using a method approved in accordance with the procedures specified in paragraph (m) of this AD, except as required by paragraph (h)(4) of this AD.

(4) For airplanes on which an operator has a record that a skin panel was replaced with a production skin panel at or before 53,000 total flight cycles: At the applicable time for the next inspection as specified in table 1 of paragraph 1.E., "Compliance," Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as provided by paragraphs (h)(1) and (h)(2) of this AD: Perform inspections and applicable corrective actions using a method approved in accordance with the procedures specified in paragraph (m) of this AD.

(5) The Condition column of table 2 of Paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, refers to airplanes in certain configurations as of the "issue date of Revision 1 of this service bulletin." However, this AD applies to airplanes in the specified configurations regardless of when the time limited repair is installed.

(i) Actions for Airplanes With a Time Limited Repair Installed

For airplanes with a time limited repair installed as specified in Boeing Special Attention Service Bulletin 737–53–1315, dated July 29, 2011; or Boeing Special Attention Service Bulletin, Revision 1, dated June 30, 2015: At the applicable times specified in table 2 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as provided by paragraphs (h)(1) and (h)(5) of this AD: Do the actions specified in paragraphs (i)(1) and (i)(2) of this AD.

(1) Do the applicable inspections to detect missing or loose fasteners and any disbonding or cracking of bonded doublers; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Repeat the applicable inspections thereafter at the applicable intervals specified Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015.

(2) Make the time limited repair permanent; and do all applicable related investigative and corrective actions; in accordance the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable related investigative and corrective actions before further flight. Accomplishing the permanent repair required by this paragraph terminates the inspections required by paragraph (i)(1) of this AD for the permanently repaired area only.

(j) Certain Post-Repair Inspections

For airplanes with a permanent repair installed as specified in Boeing Special Attention Services Bulletin 737–53–1315, Revision 1, dated June 30, 2015: At the applicable time specified in table 3 of paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as provided by paragraph (h)(1) of this AD: Do an external low frequency eddy current (LFEC) inspection for cracking of the skin at the critical fastener row of the repair doubler; and do all applicable corrective actions; in accordance the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, except as required by paragraph (h)(3) of this AD. Do all applicable corrective actions before further flight. Repeat the LFEC inspection thereafter at the applicable intervals specified Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015.

(k) Skin Panel Replacement

At the later of the times specified in paragraphs (k)(1) and (k)(2) of this AD: Replace the applicable skin panels, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015. Do all applicable related investigative and corrective actions before further flight. Doing the skin panel replacement required by this paragraph terminates the inspection requirements of paragraph (g) of this AD for that skin panel only, provided the skin panel replacement was done with a production skin panel after 53,000 total flight cycles.

(1) Before 60,000 total flight cycles, but not at or before 53,000 total flight cycles.

(2) Within 6,000 flight cycles after the effective date of this AD, but not at or before 53,000 total flight cycles.

(l) Credit for Previous Actions

This paragraph provides credit for the zone 1 actions required by paragraph (g) of this AD, as described in Boeing Special Attention Service Bulletin 737–53–1315, Revision 1, dated June 30, 2015, if the zone 1, 2, and 3 actions, as described in Boeing Special Attention Service Bulletin 737–53–1315, dated July 29, 2011, were performed before the effective date of this AD using Boeing Special Attention Service Bulletin 737–53–1315, dated July 29, 2011, except as required by paragraph (h)(4) of this AD. Boeing Special Attention Bulletin 737–53–1315, dated July 29, 2011, was incorporated by reference in AD 2012–16–07.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (n)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously for AD 2012–16–07 are approved as AMOCs for the corresponding provisions of paragraph (g) of this AD.

(n) Related Information

(1) For more information about this AD, contact Wade Sullivan, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6430; fax: 425–917–6590; email: *wade.sullivan@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 5, 2016.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11173 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6640; Directorate Identifier 2015–SW–084–AD]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Sikorsky Aircraft Corporation (Sikorsky) Model S–92A helicopters. This proposed AD would require altering the fire bottle inertia switch wiring and performing a cartridge functional test of the fire extinguishing system. This proposed AD is prompted by the inadvertent tripping of inertia-switches that has led to unintentional discharging of the fire bottles, leaving the helicopter's auxiliary power unit and engines without fire protection. The proposed actions are intended to prevent unintentional and undetected fire bottle discharges and subsequent unavailability of fire suppression in case of a fire.

DATES: We must receive comments on this proposed AD by July 12, 2016.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the "Mail" address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6640; or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed rule, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *sikorskywcs@sikorsky.com.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Kris Greer, Aviation Safety Engineer, Boston Aircraft Certification Office, Engine & Propeller Directorate, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email *kristopher.greer@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Discussion

We propose to adopt a new AD for certain serial-numbered Sikorsky Model S–92A helicopters. Sikorsky has informed us that the inadvertent tripping of inertia switches has caused several engine and auxiliary power unit fire bottle discharges during taxi, flight, and landing operations. Because these discharges are undetected, the fire bottles remain unavailable in the event of a fire.

This proposed AD would require altering the fire bottle inertia switch wiring to disable the automatic feature of the fire extinguishing system. This proposed AD would also require performing a cartridge functional test. The proposed actions are intended to prevent an unintentional and undetected fire bottle discharge and subsequent unavailability of fire suppression in the event of a fire.

FAA's Determination

We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

We reviewed Sikorsky Alert Service Bulletin 92–26–005A, Revision A, dated June 27, 2014 (ASB 92–26–005A). ASB 92–26–005A specifies performing a one-time alteration of the fire bottle inertia switch wiring to disable the automatic actuation feature of the fire extinguishing system. ASB 92–26–005A includes figures that depict the wiring and electrical connector pin changes.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the *ADDRESSES* section.

Other Related Service Information

We also reviewed Sikorsky Alert Service Bulletin 92–26–005, Basic Issue, dated June 18, 2014 (ASB 92–26–005). ASB 92–26–005 contains the same procedures as ASB 92–26–005A. However, ASB 92–26–005A contains an additional figure.

Proposed AD Requirements

This proposed AD would require, within 90 days, altering the fire bottle inertia switch wiring to disable the automatic discharge of fire bottles and performing a post-alteration cartridge functional test.

Differences Between This Proposed AD and the Service Information

This proposed AD has a compliance date within 90 days, and the service information has a calendar date, which has already passed. This proposed AD does not require performing a cartridge functional test prior to alteration. The service information does specify performing a cartridge functional test prior to alteration.

Costs of Compliance

We estimate that this proposed AD would affect 80 helicopters of U.S. Registry. Labor costs are estimated at $85 per work-hour. Altering the fire bottle switch and performing a cartridge functional test would take about 2 work-hours. No parts would be needed for an estimated cost of $170 per helicopter and $13,600 for the U.S. fleet.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by Reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Sikorsky Aircraft Corporation: Docket No. FAA–2016–6640; Directorate Identifier 2015–SW–084–AD.

(a) Applicability

This AD applies to Model S–92A helicopters, serial number 920006 through 920250, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as inadvertent tripping of a fire bottle inertia-switch. This condition results in an unintentional and undetected fire bottle discharge and subsequent unavailability of fire suppression in the event of a fire.

(c) Comments Due Date

We must receive comments by July 12, 2016.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 90 days:

(1) Alter each fire bottle inertia switch by following the Accomplishment Instructions, paragraph 3.B., of Sikorsky Alert Service Bulletin 92–26–005A, Revision A, dated June 27, 2014.

(2) Perform a cartridge functional test.

(f) Credit for Actions Previously Completed

Compliance with Sikorsky Alert Service Bulletin ASB 92–26–005, Basic Issue, dated June 18, 2014, before the effective date of this AD is considered acceptable for compliance with the actions specified in paragraph (e) of this AD.

(g) Alternative Methods of Compliance (AMOC)

(1) The Manager, Boston Aircraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: Kris Greer, Aviation Safety Engineer, Boston Aircraft Certification Office, Engine & Propeller Directorate,1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email *kristopher.greer@faa.gov*.

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(h) Additional Information

Sikorsky Alert Service Bulletin 92–26–005, Basic Issue, dated June 18, 2014, which is not incorporated by reference, contains additional information about the subject of this proposed rule. For service information identified in this proposed rule, contact Sikorsky Aircraft Corporation, Customer Service Engineering, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–Winged–S or 203–416–4299; email *sikorskywcs@sikorsky.com*. You may review a copy of information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 2621 Fire Bottle, Fixed.

Issued in Fort Worth, Texas, on May 5, 2016.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–11196 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0287]

RIN 1625–AA00

Safety Zone; Allegheny River Mile 12.0 to 12.5, Oakmont, Pennsylvania

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone for all navigable waters of the Allegheny River mile 12.0 to mile 12.5. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created from a land based firework display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Pittsburgh or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 13, 2016.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0287 using the Federal eRulemaking Portal at *http://www.regulations.gov*. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email MST1 Jennifer Haggins, Marine Safety Unit Pittsburgh, U.S. Coast Guard; telephone 412–221–0807, email *Jennifer.L.Haggins@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

II. Background, Purpose, and Legal Basis

On March 10, 2016, the Oakmont Yacht Club notified the Coast Guard that it will be conducting a fireworks display from 9:00 p.m. to 11:00 p.m. on July 16, 2016. The fireworks will be launched from land in the vicinity of Allegheny River mile 12.0–12.5. Hazards from firework displays include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters before, during, and after the scheduled event. The Coast Guard proposes this rulemaking under authority in 33 U.S.C. 1231.

III. Discussion of Proposed Rule

The COTP proposes to establish a safety zone from 9 p.m. to 11 p.m. on July 16, 2016. The safety zone would cover all navigable waters of the Allegheny River mile 12.0 to mile 12.5. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled fireworks display. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a "significant regulatory action," under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. The safety zone will close a small section of the Allegheny River for only 2 hours. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV. A. above this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting less than two hours that would prohibit entry into the safety zone. Normally such actions are categorically excluded from further review under paragraph 34(x) of Figure 2–1 of Commandant Instruction M16475.lD. A preliminary environmental analysis checklist and Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES.** We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0287 to read as follows:

§ 165.T08–0287 Safety Zone; Allegheny River Mile 12.0 to Mile 12.5, Oakmont, PA.

(a) *Location*. The following area is a safety zone: All navigable waters of the Allegheny River from mile 12.0 to mile 12.5.

(b) *Definitions*. As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Pittsburgh (COTP) in the enforcement of the safety zone.

(c) *Regulations*. (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative at 412–221–0807. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period*. This section will be enforced from 9 p.m. to 11 p.m. on July 16, 2016.

Dated: April 20, 2016.

L. McClain, Jr.,

Commander, U.S. Coast Guard, Captain of the Port Pittsburgh.

[FR Doc. 2016–11365 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2002–0021; FRL–9946–17–OAR]

RIN 2060–AN36

National Emission Standards for Hazardous Air Pollutants: Site Remediation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of reconsideration of final rule; request for public comment.

SUMMARY: This action proposes to amend the National Emission Standards for Hazardous Air Pollutants (NESHAP): Site Remediation (Site Remediation Rule) by removing exemptions from the rule for site remediation activities performed under authority of the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) and for site remediation activities performed under a Resource Conservation and Recovery Act (RCRA) corrective action or other required RCRA order. The Environmental Protection Agency (EPA) is also proposing to remove the applicability requirement that site remediations be co-located with at least one other stationary source regulated by another NESHAP. The EPA is seeking comment on these issues, but is not requesting comment on any other issues or provisions of the final Site Remediation Rule at this time.

DATES: *Comments*. Comments must be received on or before June 27, 2016. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before June 13, 2016.

Public Hearing. If anyone contacts the EPA requesting a public hearing by May 18, 2016, we will hold a public hearing on May 31, 2016. If the EPA holds a public hearing, the EPA will keep the record of the hearing open for 30 days after completion of the hearing to provide an opportunity for submission of rebuttal and supplementary information.

ADDRESSES: *Comments*. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2002–0021, at *http://www.regulations.gov*. Follow the on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0021. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/dockets*.

A red-line version of the regulatory language that incorporates the proposed changes in this action is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2002–0021).

Docket: The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2002–0021. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, EPA WJC West Building, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

Public Hearing: If a public hearing is requested by May 18, 2016, it will be held on May 31, 2016 at the EPA's Research Triangle Park Campus, 109 T.W. Alexander Drive, Research Triangle Park, NC 27711. The hearing will convene at 10:00 a.m. (Eastern Standard Time) and end at 5:00 p.m. (Eastern Standard Time). A lunch break will be held from 12:00 p.m. (Eastern Standard Time) until 1:00 p.m. (Eastern Standard Time). Please contact Ms. Virginia Hunt at (919) 541–0832 or at *hunt.virginia@epa.gov* to request a hearing, to determine if a hearing will be held, and to register to speak at the hearing, if one is held. If a hearing is requested, the last day to pre-register in advance to speak at the hearing will be May 25, 2016.

Additionally, requests to speak will be taken the day of the hearing at the hearing registration desk, although preferences on speaking times may not be able to be fulfilled. If you require the service of a translator or special accommodations such as audio description, please let us know at the time of registration. If you require an accommodation, we ask that you pre-register for the hearing, as we may not be able to arrange such accommodations without advance notice.

If no one contacts the EPA requesting a public hearing to be held concerning this proposed rule by May 18, 2016, a public hearing will not take place. If a hearing is held, it will provide interested parties the opportunity to present data, views, or arguments concerning the proposed action. The EPA will make every effort to accommodate all speakers who arrive and register. Because the hearing will be held at a U.S. governmental facility, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established new requirements for entering federal facilities. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma, or the state of Washington, you must present an additional form of identification to enter the federal building. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses, and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building, and demonstrations will not be allowed on federal property for security reasons.

The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Commenters should notify Ms. Hunt if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule. Again, a hearing will not be held unless requested.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Paula Hirtz, Refining and Chemicals Group, Sector Policies and Programs Division (E143–01), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–2618; fax number: (919) 541–0246; email address: *hirtz.paula@epa.gov*. For information about the applicability of the NESHAP to a particular entity, contact Tavara Culpepper, Office of Enforcement and Compliance Assurance (OECA); (202)564–0902; *culpepper.tavara@epa.gov*.

SUPPLEMENTARY INFORMATION:

Preamble Acronyms and Abbreviations. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

CAA	Clean Air Act
CBI	Confidential business information
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
FR	Federal Register
HAP	Hazardous air pollutants
ICR	Information collection request
NESHAP	National Emission Standards for Hazardous Air Pollutants
NTTAA	National Technology Transfer and Advancement Act
OMB	Office of Management and Budget
PRA	Paperwork Reduction Act
RCRA	Resource Conservation and Recovery Act
RFA	Regulatory Flexibility Act
UMRA	Unfunded Mandates Reform Act

Organization of this Document. The information in this preamble is organized as follows:

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I. General Information

A. What is the source of authority for the reconsideration action?

The statutory authority for this action is provided by sections 112 and 307(d)(7)(B) of the Clean Air Act (CAA) as amended (42 U.S.C. 7412 and 7607(d)(7)(B)).

B. Does this action apply to me?

The table below lists the industry categories and entities potentially regulated by this action and is not intended to be exhaustive, but rather provides a guide for readers regarding the entities that this proposed action is likely to affect. Parties potentially affected by this action include major sources, as defined in 40 CFR 63.2, that conduct one or more site remediations under the authority of CERCLA or under a RCRA corrective action or other required RCRA order; and any other site remediation that is a major source of hazardous air pollutants (HAP) itself and is not co-located with another facility regulated under 40 CFR 63. As defined under the "Waste Treatment and Disposal" industry sector in the "Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990" (see 57 FR 31576, July 16, 1992), the Site Remediation source category includes any facility taking action to remove, store, treat, and/or dispose of hazardous substances that have been released into the environment (*e.g.,* soil, groundwater, or other environmental media). The table below is provided for illustrative purposes only; to determine whether your site remediation is regulated by this action, you should examine the applicability criteria in 40 CFR 63.7881 of subpart GGGGG (National Emission Standards for Hazardous Air Pollutants: Site Remediation).

INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS ACTION

Industry category	NAICS Code [1]	Examples of regulated entities
Industry	325110 325180 325199 325211 325320 333316 562112	Site remediation activities at currently operating or closed businesses at which organic materials currently are or have been in the past stored, processed, treated, or otherwise managed at the facility. These facilities include, but are not limited to: Manufacturing of petrochemicals, inorganic chemicals, organic chemicals, plastics and resins, pesticides and agricultural chemicals, and photographic and photocopying equipment; other warehousing and storage; and hazardous waste collection facilities.
Federal Government	92811	Federal agencies that conduct site remediation activities, including agencies or activities related to national security.

[1] North American Industry Classification System.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this action is available on the Internet through the EPA's Technology Transfer Network (TTN) Web site, a forum for information and technology exchange in various areas of air pollution control. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *http://www.epa.gov/ttn/atw/siterm/sitermpg.html.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same Web site.

D. What should I consider as I prepare my comments for the EPA?

Do not submit information containing CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, you must submit a copy of the comment that does not contain the information claimed as CBI for inclusion in the public docket. If you submit a CD–ROM or disk that does not contain CBI, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI to only the following address: Ms. Paula Hirtz, c/o OAQPS Document Control Officer (Room C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention: Docket ID No. EPA–HQ–OAR–2002–0021.

II. Background

The EPA finalized the Site Remediation Rule on October 8, 2003 (68 FR 58172). The rule exempted site remediations performed under the authority of CERCLA and those conducted under a RCRA corrective action or other required RCRA order. The final rule also did not regulate metal or other inorganic HAP due to the low potential of emissions of these chemicals from site remediation activities. On December 8, 2003, pursuant to section 307(d)(7)(B) of the CAA, the EPA received a petition for reconsideration from Sierra Club, the Blue Ridge Environmental Defense League, and Concerned Citizens for Nuclear Safety. The reconsideration petition stated that (1) the EPA lacked the statutory authority to exempt site remediation activities conducted under the authority of CERCLA or RCRA from NESHAP requirements, and (2) the EPA had a duty to set standards for each listed HAP emitted from a source category.

Petitioners also filed a petition for judicial review of the Site Remediation Rule on December 5, 2003, in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) under CAA section 307(b)(1). In response to the plaintiffs' and EPA's joint motion, the D.C. Circuit held this action in abeyance by order dated January 22, 2004, so that settlement discussions could take place to assess whether the case could be resolved without the Court.

On November 29, 2006, the EPA promulgated amendments to the Site Remediation Rule (71 FR 69011), but did not resolve, address, or respond to the issues in the petition for reconsideration. On October 14, 2014, the D.C. Circuit ordered the parties to show cause why the case should not be administratively terminated, and on November 13, 2014, the parties filed a joint response informing the Court that they were actively exploring a new approach. On March 25, 2015, the EPA issued a letter to the petitioners granting reconsideration on the issues raised in the petition and indicated that the agency would issue a **Federal Register** notice regarding the reconsideration process. The petition for reconsideration is available for review in the rulemaking docket (see Docket ID No. EPA–HQ–OAR–2002–0021–0024).

The EPA now requests comment on the first of the two issues raised in the December 8, 2003, petition for reconsideration: The exemption for site remediations performed under the authority of CERCLA or RCRA. We are not addressing the second issue, whether the EPA has a duty to set standards for heavy metal HAP emissions from site remediation activities, in this action. Since evaluation of this second issue fits most naturally into the residual risk and technology review (RTR) process, the EPA will initiate reconsideration of the issue of regulating heavy metal HAP when it issues a proposed rule presenting the RTR for the Site Remediation source category. The EPA is not seeking comments on this issue until such a proposal is made.

III. Discussion of the Proposed Action To Remove the CERCLA and RCRA Exemption

The October 8, 2003, NESHAP exempts site remediations performed under the authority of CERCLA and those conducted under a RCRA corrective action or other required RCRA order. The EPA now proposes to remove this exemption and establish requirements and compliance dates for site remediation activities conducted under the authority of CERCLA or RCRA that would be affected by the proposed rule changes.

A. What is the EPA proposing regarding site remediations performed under the authority of CERCLA or performed under a RCRA corrective action or other required RCRA order?

On October 8, 2003, the EPA finalized the July 2002 proposal to exempt site remediations performed under the authority of CERCLA and those performed under RCRA corrective action or other orders authorized under RCRA (*i.e.,* RCRA/CERCLA exemption). Several commenters on the 2002 proposed rule opposed the exemption. These commenters asserted that neither the RCRA nor CERCLA programs have air emission standards for site remediation activities and that the intent of CAA section 112 is to establish NESHAP for HAP emissions from these activities. In contrast, other commenters supported the proposed exemption, stating that the RCRA and CERCLA cleanup programs have appropriate site-specific provisions to provide for the protection of public health and the environment from air pollutants emitted during site remediation activities. We determined the proposed provisions were appropriate, and we explained in the preamble to the October 8, 2003, final rule and in the Background Information Document for the final rule that the hazardous waste corrective action program under RCRA and the Superfund program under CERCLA serve as the functional equivalents of the establishment of NESHAP under CAA section 112. This conclusion was based on the requirements of these programs to consider the same HAP emissions that we regulate under the NESHAP and that these programs provide opportunities for public involvement through the Record of Decision process for Superfund cleanups and the RCRA permitting process for corrective action cleanups.

The EPA then received the December 8, 2003, petition asserting that the public lacked an opportunity to comment on this new rationale presented in the final rule. The EPA granted reconsideration on this issue in response to the December 8, 2003, petition. Upon further consideration and re-evaluation of petitioners' arguments, we now propose to remove the exemptions for activities conducted under the authority of CERCLA or RCRA from the Site Remediation Rule.

In listing Site Remediation as a source category under CAA section 112(c)(1) in 1992, we defined it to include the cleanup of sites that possess contaminated media, including National Priorities List Sites and Corrective Action Sites. See the document titled *Documentation for Developing the Initial Source Category List, Final Report* EPA–450/3–91–030, July 1992, which is available in the rulemaking docket (Docket ID No. EPA–HQ–OAR–2002–0021). Once the EPA has listed a source category or subcategory under CAA section 112(c)(1), CAA section 112(c)(2) requires the EPA to establish emissions standards under CAA section 112(d) for the source category or subcategory. The EPA, thus, has an obligation to extend its existing technology-based NESHAP to establish emission standards for all such sources in the Site Remediation source category, including those conducted under the authority of CERCLA and RCRA, under CAA section 112(d). The site remediation activities conducted under the authority of CERCLA and RCRA are similar to site remediation activities that were not exempt from the Site Remediation Rule, and the requirements of the Site Remediation Rule are appropriate for and achievable by all site remediation activities.

Specifically, we are proposing to amend the rule by removing 40 CFR 63.7881(b)(2) and (3), the provisions that expressly exempt site remediations conducted under CERCLA or RCRA from the Site Remediation Rule's requirements. With the removal of this exemption, site remediations conducted under the authority of CERCLA or RCRA will become subject to all applicable requirements of the Site Remediation Rule. These requirements include emission limitations and work practice standards for HAP emitted from site remediation activities. The Rule also establishes requirements to demonstrate initial and continuous compliance with the emission limitations and work practice standards. The Rule applies to sites that clean up remediation material containing 1 megagram per year or more organic HAP listed in Table 1 of the Site Remediation Rule. It specifically requires emissions controls and/or work practice requirements for three groups of emission points: Process vents, remediation material management units (tanks, containers, surface impoundments, oil/water separators, organic/water separators, drain systems), and equipment leaks. In addition, the rule contains monitoring, recordkeeping, and reporting requirements.

In order to make the rule applicable to CERCLA and RCRA site remediations, we are further proposing to remove the requirement in 40 CFR 63.7881(a)(2) that an affected site remediation be co-located with a facility that is regulated by other NESHAP (*i.e.,* by a separate subpart under 40 CFR part 63). This is necessary to ensure that site remediations that are themselves major sources of HAP, without regard for co-location with another facility, are now covered by the rule.

We are soliciting comment on these proposed rule amendments. The EPA is accepting comment only on the proposed removal of the exemptions for site remediations conducted under the authority of CERCLA or RCRA. The analyses presented in this notice and in supporting documents in the docket do not affect or alter other aspects of the Site Remediation Rule.

B. What compliance dates are we proposing?

We are proposing to make the recordkeeping and reporting requirements specified in 40 CFR 63.7950–7953 and 63.7955 applicable to new and existing affected sources conducting site remediations under CERCLA or RCRA on the effective date of the final amendment removing the RCRA/CERCLA exemption. The effective date is the date of publication of the final rule in the **Federal Register**.

We are proposing this applicability date for these recordkeeping and reporting requirements because we believe that the recordkeeping and reporting schedule that applied to new and existing site remediation affected sources in the 2003 final rule is still applicable to new and existing sources that become subject to the Site Remediation Rule as a result of removing the CERCLA and RCRA exemptions. In addition, the available information indicated this requirement should be immediately implementable by the affected facilities.

The proposed compliance dates for the rule's substantive requirements differ according to whether a site remediation is an existing or new affected source. For the purpose of this proposed rule revision, you are an existing affected source if you commenced construction or reconstruction of the affected source before the date of publication of this proposed rule in the **Federal Register** and you conduct site remediation activities that are overseen by the EPA or another authorized agency (*e.g.*, a state or local environmental protection agency) under the authorities of CERCLA or RCRA. For these existing affected sources, we are proposing a compliance date for the process vent, remediation material management unit, and equipment leak requirements of 18 months from the effective date of the final amendment removing the RCRA/CERCLA exemption.

You are a new affected source if you commenced construction or reconstruction of the affected source after the date of publication of this proposed rule in the **Federal Register** and you conduct site remediation activities that are overseen by the EPA or another authorized agency under the authorities of CERCLA or RCRA. For these new affected sources, we are proposing a compliance date for the process vent, remediation material management unit, and equipment leak requirements on the effective date of the final amendment removing the RCRA/CERCLA exemption.

IV. Summary of Cost, Environmental, and Economic Impacts and Additional Analyses Conducted

A. What are the affected sources?

We estimate 69 major source facilities will become subject to the Site Remediation Rule as a result of the proposed removal of the RCRA/CERCLA exemption. Based on available information from the RCRA and CERCLA programs, 24 of these facilities are expected to be subject to a limited set of the rule requirements under 40 CFR 63.7881(c)(1) due to the low annual quantity of HAP contained in the remediation material excavated, extracted, pumped, or otherwise removed during the site remediations conducted at the facilities. These facilities will only be required to prepare and maintain written documentation to support the determination that the total annual quantity of the HAP contained in the remediation material excavated, extracted, pumped, or otherwise removed at the facility is less than 1 megagram per year. They are not subject to any other emissions limits, work practices, monitoring, reporting, or recordkeeping requirements. For the remaining 45 facilities, we anticipate each facility will have an annual quantity of HAP in the removed remediation material of 1 megagram or more. For these facilities, we expect that either the facilities already meet the emission control and work practice requirements of the Site Remediation Rule or no emission control requirements or work practice standards will apply because the waste is shipped offsite for treatment and no controls or work practice requirements would be applicable prior to treatment (*e.g.*, contaminated soil before it is shipped offsite for destruction). For these 45 facilities, we anticipate the only new requirements for the Site Remediation Rule will be the initial and ongoing recordkeeping and reporting obligations required by 40 CFR 63.7936 and 40 CFR 63.7950 through 63.7952. These sections describe the recordkeeping and reporting activities required for transferring the remediation material off-site to another facility; the initial notification and on-going notification requirements; the ongoing semi-annual compliance reporting requirements; and recordkeeping requirements for continuous monitoring, planned routine maintenance, and for units that are exempt from control requirements. While new site remediations are likely to be conducted under the authority of CERCLA or RCRA in the future, we are currently not aware of any specific new site remediation facilities that are expected to be constructed.

The potential scope of this action's impacts on affected entities is discussed in greater depth in the memorandum, *National Impacts Associated with the Proposed Amendments to Remove the Exemption for Facilities Performing Site Remediations under CERCLA or RCRA in the NESHAP for Site Remediation,* which is available in the rulemaking docket (Docket ID No. EPA–HQ–OAR–2002–0021).

B. What are the air quality impacts?

We do not anticipate any HAP emission reductions from the proposed removal of the RCRA/CERCLA exemption. We expect that facilities newly becoming subject to the rule will either be subject to a limited set of the emissions control requirements of the rule due to the low amount of HAP contained in the remediation material handled, will already meet the emissions control requirements of the rule, or will not have any applicable emissions control requirements for the specific remediation activities and material handled.

C. What are the cost impacts?

None of the 69 affected facilities are anticipated to implement additional emissions control to meet the requirements of the Site Remediation Rule and, therefore, we estimate no capital costs associated with the proposed removal of the RCRA/CERCLA exemption. We have estimated the nationwide costs for compliance with the reporting and recordkeeping requirements to be approximately $2.16 million.

D. What are the economic impacts?

Both the magnitude of control costs needed to comply with a regulation and the distribution of these costs among affected facilities can have a role in determining how the market will change in response to that regulation. We estimate an annualized cost of $13,000 per affected facility for the facilities with remediation waste containing HAP below the rule annual threshold of 1 megagram and $41,000 per affected facility for the facilities with remediation waste containing the rule threshold amount of 1 megagram or more HAP annually. We, therefore, estimate the average annualized cost per affected facility to be about $31,000 and the total annualized costs for the proposed amendments are estimated to be about $2.16 million. Without detailed industry data, it is not possible to conduct a complete quantitative analysis of economic impacts. However, prior economic impact screening analyses suggest the impacts of the proposed amendment will be minimal. In the economic analysis for this action, *Economic Impact Analysis for Site Remediation NESHAP Amendments* (Docket ID No. EPA–HQ–OAR–2002–0021), we found that all firms with compliance costs are estimated to have firm-level cost-to-sales ratios of less than 0.03 percent.

E. What are the benefits?

The proposed standards will ensure existing air emissions controls implemented at facilities that become subject to the rule with the removal of the RCRA/CERCLA exemption will continue to reduce emissions to at least the required levels of the rule. In addition, any future remediation activities at these facilities or facilities constructed in the future will include the required levels of HAP emissions control. We have not quantified the monetary benefits associated with the amendment; however, any future avoided emissions will result in improvements in air quality and reduce negative health effects associated with exposure to such air pollution.

V. Solicitation of Public Comment and Participation

The EPA seeks full public participation in arriving at its final decisions. The EPA requests public comment on the issues under reconsideration addressed in this notice: (1) The proposed removal of the RCRA and CERCLA exemptions and (2) the proposed removal of the applicability requirement that a site remediation activity be co-located with other source categories subject to other NESHAP. At this time, the EPA is seeking comment only on the amendments described above. The EPA will not respond to any comments addressing any other issues or any other provisions of the final rule or any other rule.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the OMB for review.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to the OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2062.06. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The information requirements in this rulemaking are based on the notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These notifications, reports, and records are essential in determining compliance, and are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to agency policies set forth in 40 CFR part 2, subpart B.

Respondents/affected entities: Unlike a specific industry sector or type of business, the respondents potentially affected by this ICR cannot be easily or definitively identified. Potentially, the Site Remediation Rule may be applicable to any type of business or facility at which a site remediation is conducted to clean up media contaminated with organic HAP when the remediation activities are performed, the authority under which the remediation activities are performed, and the magnitude of the HAP in the remediation material meets the applicability criteria specified in the rule. A site remediation that is subject to this rule potentially may be conducted at any type of privately-owned or government-owned facility at which contamination has occurred due to past events or current activities at the facility. For site remediation performed at sites where the facility has been abandoned and there is no owner, a government agency takes responsibility for the cleanup.

Respondent's obligation to respond: Mandatory (42 U.S.C. 7414).

Estimated number of respondents: 355 total for the source category, of which 69 are estimated to become respondents as a result of this proposed action.

Frequency of response: Semiannual.

Total estimated burden: 146,265 total hours (per year) for the source category, of which 13,268 hours are estimated as a result of this proposed action. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $8.9 million total (per year) for the source category, of which approximately $811,000 is estimated as a result of this proposed action. This includes $582,000 total annualized capital or operation and maintenance costs for the source category, of which $0 is estimated as a result of this proposed action.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *oria_submissions@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than June 13, 2016. The EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. There are no small entities subject to the requirements of this action. The proposed amendments to the Site Remediation Rule are estimated to affect 69 facilities. Of these 69 facilities, 13 are owned by the federal government, which is not a small entity. The remaining 56 facilities are owned by 46 firms, and the Agency has determined that none of these can be classified as small entities using the Small Business Administration size standards for their respective industries. Details of this analysis are presented in the memorandum, *Economic Impact Analysis for Site Remediation NESHAP Amendments,* which is available in the docket for this action (Docket ID No. EPA–HQ–OAR–2002–0021).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. There are no site remediations at facilities that would be affected by the proposed amendments that are owned or operated by tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. The proposed amendments increase the level of protection provided to human health or the environment by regulating site remediations previously exempt from the rule.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 2, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency (EPA) proposes to amend Title 40, chapter I, of the Code of Federal Regulations (CFR) as follows:

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

■ 1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart GGGGG—National Emission Standards for Hazardous Air Pollutants: Site Remediation

■ 2. Section 63.7881 is amended by:

■ a. Revising paragraphs (a)(2) introductory text, (a)(2(i) and (ii), (a)(3) introductory text, and (b) introductory text;

■ b. Removing paragraphs (b)(2) and (3); and

■ c. Redesignating paragraphs (b)(4) through (6) as (b)(2) through (4).

The revisions read as follows:

§ 63.7881 Am I subject to this subpart?

(a) * * *

(2) Your site remediation satisfies either paragraph (a)(2)(i) or (ii) of this section.

(i) Your site remediation is co-located at your facility with one or more other stationary sources that emit HAP and meet an affected source definition specified for a source category that is regulated by another subpart under 40 CFR part 63. This condition applies regardless whether or not the affected stationary source(s) at your facility is subject to the standards under the applicable subpart(s).

(ii) Your site remediation is not co-located with one or more other stationary sources.

(3) Your site remediation, either alone or when aggregated with a co-located facility, is a major source of HAP as defined in § 63.2, except as specified in paragraph (a)(3)(i) or (ii) of this section. A major source emits or has the potential to emit any single HAP at the rate of 10 tons (9.07 megagrams) or more per year or any combination of HAP at a rate of 25 tons (22.68 megagrams) or more per year.

* * * * *

(b) You are not subject to this subpart if your site remediation qualifies for any of one of the exemptions listed in paragraphs (b)(1) through (4) of this section.

* * * * *

■ 3. Section 63.7882 is amended by revising paragraph (b) and removing paragraph (c).

The revision reads as follows:

§ 63.7882 What site remediation sources at my facility does this subpart affect?

* * * * *

(b) *Affected existing and new sources.* Each affected source for your site is existing if you meet the conditions specified in paragraph (b)(1) or (2) of this section. Each affected source for your site is new if you meet the conditions specified in paragraph (b)(3) or (4) of this section.

(1) Your affected source is an existing source if you commenced construction or reconstruction of the affected source before July 30, 2002, and you are not conducting the site remediation under the authority specified in either paragraph (b)(5)(i) or (ii) of this section.

(2) Your affected source is an existing source if you commenced construction or reconstruction of the affected source before May 13, 2016 and you are conducting the site remediation under the authority specified in either paragraph (b)(5)(i) or (ii) of this section.

(3) Your affected source is a new source if you commenced construction or reconstruction of the affected source on or after July 30, 2002, and you are not conducting the site remediation under the authority specified in either paragraph (b)(5)(i) or (ii) of this section. An affected source is reconstructed if it meets the definition of reconstruction in § 63.2.

(4) Your affected source is a new source if you commenced construction or reconstruction of the affected source on or after May 13, 2016, and you are conducting the site remediation under the authority specified in either paragraph (b)(5)(i) or (ii) of this section.

(5) Your site remediation conducted under the authority specified in paragraphs (b)(5)(i) or (ii) is existing or new as specified in paragraphs (b)(1) through (4) of this section.

(i) Your site remediation is performed under the authority of the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) as a remedial action or a non time-critical removal action.

(ii) Your site remediation is performed under a Resource Conservation and Recovery Act (RCRA) corrective action conducted at a treatment, storage and disposal facility (TSDF) that is either required by your permit issued by either the U.S. Environmental Protection Agency (EPA) or a State program authorized by the EPA under RCRA section 3006; required by orders authorized under RCRA; or required by orders authorized under RCRA section 7003.

* * * * *

■ 4. Section 63.7883 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§ 63.7883 When do I have to comply with this subpart?

(a) If you have an existing affected source, you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart as specified in paragraph (a)(1) or (a)(2), as applicable to your affected source.

(1) If the affected source meets the conditions specified in § 63.7882(b)(1), you must comply no later than October 9, 2006.

(2) If the affected source meets the conditions specified in § 63.7882(b)(2), you must comply no later than [insert date 18 months after date of final rule publication in the **Federal Register**].

(b) If you have a new affected source that manages remediation material other than a radioactive mixed waste as defined in § 63.7957, then you must meet the compliance date specified in one of paragraphs (b)(1) through (4) of this section, as applicable to your affected source.

(1) If the affected source meets the conditions specified in § 63.7882(b)(3) and the affected source's initial startup date is on or before October 8, 2003, you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you by October 8, 2003.

(2) If the affected source meets the conditions specified in § 63.7882(b)(3) and the affected source's initial startup date is after October 8, 2003, you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you upon initial startup.

(3) If the affected source meets the conditions specified in § 63.7882(b)(4) and the affected source's initial startup date is on or before [insert date of final rule publication in the **Federal Register**], you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you by [insert date of final rule publication in the **Federal Register**].

(4) If the affected source meets the conditions specified in § 63.7882(b)(4) and the affected source's initial startup date is after [insert date of final rule publication in the **Federal Register**], you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you upon initial startup.

(c) If you have a new affected source that manages remediation material that is a radioactive mixed waste as defined in § 63.7957, then you must meet the compliance date specified in one of paragraphs (c)(1) through (4) of this section, as applicable to your affected source.

(1) If the affected source meets the conditions specified in § 63.7882(b)(3) and the affected source's initial startup date is on or before October 8, 2003, you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you no later than October 9, 2006.

(2) If the affected source meets the conditions specified in § 63.7882(b)(3) and the affected source's initial startup date is after October 8, 2003, you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you upon initial startup.

(3) If the affected source meets the conditions specified in § 63.7882(b)(4) and the affected source's initial startup date is on or before [insert date of final rule publication in the **Federal Register**], you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you no later than [insert date of final rule publication in the **Federal Register**].

(4) If the affected source meets the conditions specified in § 63.7882(b)(4) and the affected source's initial startup date is after [insert date of final rule publication in the **Federal Register**], you must comply with each emission limitation, work practice standard, and operation and maintenance requirement in this subpart that applies to you upon initial startup.

* * * * *

■ 5. Section 63.7950 is amended by revising paragraphs (b) and (c) to read as follows:

§ 63.7950 What notifications must I submit and when?

* * * * *

(b)(1) As specified in § 63.9(b)(2), if you start up your affected source before October 8, 2003 and you are not conducting the site remediation under the authority specified in either § 63.7882(b)(5)(i) or (ii), you must submit an Initial Notification not later than 120 calendar days after October 8, 2003.

(2) As specified in § 63.9(b)(2), if you start up your affected source before May 13, 2016 and you are conducting the site remediation under the authority specified in either § 63.7882(b)(5)(i) or (ii), you must submit an Initial Notification not later than 120 calendar days after [insert date of final rule publication in the **Federal Register**].

(c) As specified in § 63.9(b)(3), if your affected source is new or reconstructed as specified in § 63.7882 (b)(3) or (4) and you start your new or reconstructed affected source on or after the respective effective date, you must submit an Initial Notification no later than 120 calendar days after initial startup.

* * * * *

[FR Doc. 2016–10988 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 11

[PS Docket No. 15–94; PS Docket No. 15–91; DA 16–482]

Rules Regarding the Emergency Alert System and Wireless Emergency Alerts

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment and reply comment deadlines.

SUMMARY: In this document, the Public Safety and Homeland Security Bureau (Bureau) extends the deadline for filing comments and reply comments on its Emergency Alert System (EAS) and Wireless Emergency Alerts (WEA) Notice of Proposed Rulemaking (Emergency Alerting NPRM), which sought comment on proposed changes in four areas: Improving alerting organization at the state and local levels; building effective community-based public safety exercises; ensuring that alerting mechanisms are able to leverage advancements in technology, including IP-based technologies; and securing the EAS against accidental misuse and malicious intrusion.

DATES: The comment period for the proposed rule published at 81 FR 15792, March 24, 2016 is extended. Comments are due on or before June 8, 2016, and reply comments are due on or before July 8, 2016.

ADDRESSES: You may submit comments to the Emergency Alerting NPRM, identified by PS Docket Nos. 15–94 and 15–91, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- Paper Filers: Parties that choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th St. SW., Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

FOR FURTHER INFORMATION CONTACT: Lisa Fowlkes, Deputy Bureau Chief, Public Safety and Homeland Security Bureau, at (202) 418–7452, or by email at *Lisa.Fowlkes@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau's Order in PS Docket Nos. 15–94 and 15–91, DA 16–482, adopted and released on May 5, 2016, and pertaining to the proposed rules published March 24, 2016 (81 FR 15792). The complete text of this document is available for public inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text is also available on the Commission's Web site at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0505/DA-16-482A1.pdf,* or by using the search function on the ECFS Web page at *http://www.fcc.gov/cgb/ecfs/.*

Synopsis

The Bureau released an Order on May 5, 2016, which extends the comment and reply comment filing deadlines for the Emergency Alerting NPRM, 81 FR 15792, March 24, 2016. The Order responds to requests from Monroe Electronics, Inc., the National Alliance of State Broadcasters Associations, the Broadcast Warning Working Group, and the Washington State SECC seeking an extension of the comment period. Pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and Sections 0.191, 0.392, and 1.46 of the Commission's rules, 47 CFR 0.191, 0.392, and 1.46, the Bureau extends the deadline for filing comments until June 8, 2016, and extends the deadline for filing reply comments until July 8, 2016.

Federal Communications Commission.

Lisa M. Fowlkes,

Deputy Bureau Chief, Public Safety and Homeland Security Bureau.

[FR Doc. 2016–11232 Filed 5–12–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PS Docket 13–239, PS Docket 11–60; DA 16–463]

Public Safety and Homeland Security Bureau Seeks Comment on Wireless Carriers' Proposal To Increase Resilience and Enhance Information Sharing During Disasters

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seeks comment on the ex parte proposal made by AT&T, Sprint, T-Mobile, US Cellular, and Verizon, together with CTIA (collectively, "the carriers"), in which they announce a "Wireless Resiliency Cooperative Framework" described as "a voluntary initiative that will enhance coordination and communication to advance wireless service continuity and information sharing during and after emergencies and disasters."

DATES: Comments are due on or before May 31, 2016.

ADDRESSES: See the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Renee Roland, Special Counsel, Public Safety and Homeland Security Bureau, at (202) 418–2352, or Lauren Kravetz, Chief of Staff, Public Safety and Homeland Security Bureau, at (202) 418–7944.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, DA 16–463, released on April 28, 2016. The document is available for download at *http://fjallfoss.fcc.gov/edocs_public/.* The complete text of this document also available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

1. On April 27, 2016, the carriers filed an ex parte letter detailing a five prong approach to enhance industry coordination to "facilitate greater network resiliency and faster restoration of service" which they assert will "obviate the need for legislative action or inflexible rules that could have unintended consequences." Specifically, the five prongs include: (1) Providing for reasonable roaming under disaster arrangements when technically feasible; (2) fostering mutual aid during emergencies; (3) enhancing municipal preparedness and restoration; (4) increasing consumer readiness and preparation; and (5) improving public awareness and stakeholder communications on service and restoration status. Under each prong, the carriers provide specific actions that they will undertake designed to "enhance coordination among wireless carriers and all key stakeholders, improving information sharing and making wireless network resiliency more robust."

2. In its 2013 Notice of Proposed Rulemaking in this docket (Resiliency Notice), the Commission sought comment on, inter alia, the means to enable greater resiliency and consumer transparency with respect to the performance of wireless communications networks during disasters, including seeking comment on mandatory disclosures or the use of voluntary industry measures. 78 FR 69018, November 18, 2013. In addition, since the Resiliency Notice was issued and the record compiled, the Commission's Public Safety and

Homeland Security Bureau has engaged in a number of meetings with a variety of stakeholders to understand the data that different segments value in evaluating the overall resiliency of wireless networks and outage impacts, as well as other factors in developing more resilient wireless networks. Accordingly, the Commission seeks comment on the carriers' "Wireless Resiliency Cooperative Framework" in light of the aims of the Resiliency Notice and the associated record.

3. Interested parties may file comments until fifteen days after the publication of this document in the **Federal Register**. All pleadings are to reference PS Dockets 13–239 and 11–60. This proceeding is a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules.[1] Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with section 1.1206(b). In proceedings governed by section 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

4. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties that choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

5. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

6. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

7. For further information, contact: Renee Roland, Special Counsel, Public Safety and Homeland Security Bureau, at (202) 418–2352, *renee.roland@fcc.gov,* or Lauren Kravetz, Chief of Staff, Public Safety and Homeland Security Bureau, at (202) 418–7944, *lauren.kravetz@fcc.gov.*

Federal Communications Commission.

Lisa M. Fowlkes,

Deputy Bureau Chief, Public Safety and Homeland Security Bureau.

[FR Doc. 2016–11233 Filed 5–12–16; 8:45 am]

BILLING CODE 6712–01–P

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[1] *Id.* para.74.

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 191 and 192

[Docket No. PHMSA–2011–0023]

RIN 2137–AE72

Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On April 8, 2016, (81 FR 20722) PHMSA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) titled: "Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines" seeking comments on changes to the pipeline safety regulations for gas transmission and gathering pipelines. PHMSA has received several requests to extend the comment period. PHMSA is granting these requests and extending the comment period from June 7, 2016, to July 7, 2016.

DATES: The closing date for filing comments is extended from June 7, 2016, to July 7, 2016.

ADDRESSES: Comments should reference Docket No. PHMSA–2011–0023 and may be submitted in the following ways:

- *E-Gov Web site: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* DOT Docket Management System: U.S. DOT, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* U.S. DOT Docket Management System; West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the Docket No. PHMSA–2011–0023 at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard. Internet users may submit comments to the Docket at *http://www.regulations.gov.*

Note: Comments are posted without changes or edits to *http://www.regulations.gov,* including any personal information provided. There is a privacy statement published on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For further information contact Mike Israni at 202–366–4571 or by email at *mike.israni@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On April 8, 2016, PHMSA issued a NPRM that would make amendments to the pipeline safety regulations for gas transmission and gathering pipelines. Since the issuance of the NPRM, PHMSA has received comment extension requests from the following entities:

- American Gas Association
- American Petroleum Institute
- American Public Gas Association
- California Public Utilities Commission
- Consol Energy Inc.
- Gas Processors Association
- Independent Petroleum Association of American
- Interstate Natural Gas Association of America
- Marcellus Shale Coalition
- National Association of Pipeline Safety Representatives
- National Association of Regulatory Utility Commissioners
- New York State Public Service Commission
- Texas Pipeline Association

PHMSA believes that extension of the comment period is warranted based on the information provided in these requests. Therefore, PHMSA has extended the comment period from June 7, 2016, to July 7, 2016.

Issued in Washington, DC, on May 9, 2016, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Acting Associate Administrator for Pipeline Safety.

[FR Doc. 2016–11240 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–60–P

Notices

Federal Register
Vol. 81, No. 93
Friday, May 13, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–SC–16–0044; SC16–900–1 NC]

Generic Fruit Crops; Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request an extension and revision to the approved forms and generic information collection for marketing orders covering fruit crops.

DATES: Comments on this notice are due by July 12, 2016 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *www.regulations.gov.* Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *www.regulations.gov.* All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Andrew Hatch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Room 1406–S, Washington, DC 20250–0237; Telephone: (202) 720–6862; Fax: (202) 720–8938; or Email: *andrew.hatch@ams.usda.gov.*

Small businesses may request information on this notice by contacting Antoinette Carter, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Room 1406–S, Washington, DC 20250–0237; Telephone (202) 720–2491; Fax: (202) 720–8938; or Email: *Antoinette.Carter@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Marketing Orders for Fruit Crops.

OMB Number: 0581–0189.

Expiration Date of Approval: December 31, 2016.

Type of Request: Extension and Revision of a currently approved information collection.

Abstract: Marketing orders provide an opportunity for producers of fresh fruits, vegetables and specialty crops, in specified production areas, to work together to solve marketing problems that cannot be solved individually. This notice covers the following marketing order citations: 7 CFR parts 905 (Florida citrus), 906 (Texas citrus), 915 (Florida avocados), 920 (California kiwifruit), 922 (Washington apricots), 923 (Washington cherries), 924 (Oregon/ Washington prunes), 925 (California table grapes), 927 (Oregon/Washington pears), and 929 (Cranberries grown in 10 States). Marketing order regulations help ensure adequate supplies of high quality product and adequate returns to producers. Marketing orders are authorized under the Agricultural Marketing Agreement Act of 1937 (Act), as amended (7 U.S.C. 601–674). The Secretary of Agriculture is authorized to oversee the marketing order operations and issue regulations recommended by a committee of representatives from each commodity industry.

The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the marketing orders. Under the Act, marketing orders may authorize: Production and marketing research, including paid advertising; volume regulations; reserves, including pools and producer allotments; container regulations; and quality control. Assessments are levied on handlers regulated under the marketing orders.

USDA requires several forms to be filed to enable the administration of each marketing order. These include forms covering the selection process for industry members to serve on a marketing order's committee or board and ballots used in referenda to amend or continue marketing orders.

Under Federal marketing orders, producers and handlers are nominated by their peers to serve as representatives on a committee or board which administers each program. Nominees must provide information on their qualifications to serve on the committee or board. Qualified nominees are then appointed by the Secretary. Formal rulemaking amendments must be approved in referenda conducted by USDA and the Secretary. For the purposes of this action, ballots are considered information collections and are subject to the Paperwork Reduction Act. If a marketing order is amended, handlers are asked to sign an agreement indicating their willingness to abide by the provisions of the amended marketing order.

Some forms are required to be filed with the committee or board. The marketing orders and their rules and regulations authorize the respective commodities' committees and boards, the agencies responsible for local administration of the marketing orders, to require handlers and producers to submit certain information. Much of the information is compiled in aggregate and provided to the respective industries to assist in marketing decisions. The committees and boards have developed forms as a means for persons to file required information relating to supplies, shipments, and dispositions of their respective commodities, and other information needed to effectively carry out the purpose of the Act and their respective orders, and these forms are utilized accordingly.

The forms covered under this information collection require respondents to provide the minimum information necessary to effectively carry out the requirements of the marketing orders, and use of these forms is necessary to fulfill the intent of the Act as expressed in the marketing orders' rules and regulations.

The information collected is used only by authorized employees of the committees and authorized representatives of the USDA, including AMS, Specialty Crops Program's regional and headquarters' staff. Authorized committee or board employees are the primary users of the information and AMS is the secondary user.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .31 hours per response.

Respondents: Producers, handlers, processors, cooperatives, and public members.

Estimated Number of Respondents: 15,950.

Estimated Number of Responses: 26,761.

Estimated Number of Responses per Respondent: 1.68.

Estimated Total Annual Burden on Respondents: 8,294 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581–0189 Generic OMB Fruit Crops, and be sent to the USDA in care of the Docket Clerk at the address above. All comments received will be available for public inspection during regular business hours at the same address.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

AMS is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A 60-day comment period is provided to allow interested persons to respond to the notice.

Dated: May 10, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–11319 Filed 5–12–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LPS–16–0032]

Request for Revision to and Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget (OMB) for an extension of and revision to the currently approved information collection "Livestock, Poultry, Meat, and Grain Market News Reports" (0186–0033), which AMS is proposing to retitle as the "Livestock, Poultry, and Grain Market News."

DATES: Comments received by July 12, 2016.

Additional Information or Comments: Interested persons are invited to submit comments concerning this information collection document. Comments should be submitted online at *www.regulations.gov* or sent to Anjeanette Johnson, Market News Reporter; Livestock, Poultry, and Grain Market News Division; Livestock, Poultry, and Seed Program; Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave. SW., Room 2619–S, STOP 0252; Washington, DC 20250–0252; telephone (202) 692–0086; fax (202) 690–3732; or email *Anjeanette.Johnson@ams.usda.gov.* All comments should reference the docket number (AMS–LPS–16–0032), date, and page number of this issue in the **Federal Register**. All comments received will be posted without change, including any personal information provided, online at *www.regulations.gov* and will be made available for public inspection at the above physical address during regular business hours.

SUPPLEMENTARY INFORMATION:

Title: Livestock, Poultry, and Grain Market News.

OMB Number: 0581–0033.

Expiration Date of Approval: September 30, 2016.

Type of Request: Revision to and extension of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946, as amended, 7 U.S.C. 1621–1627, authorizes the Secretary of Agriculture to provide up-to-the-minute nationwide coverage of prices, supply, demands, trends, movement, and other pertinent information affecting the trading of livestock, poultry, meat, eggs, grain, and their related products, as well as locally produced and marketed products. The market reports compiled and disseminated by the Livestock, Poultry, and Grain Market News (LPGMN) Division of AMS' Livestock, Poultry, and Seed Program provide current, unbiased, and factual information to all stakeholders in the U.S. agricultural industry. LPGMN reports assist producers, processors, wholesalers, retailers, and others to make informed production, purchasing, and sales decisions. LPGMN reports also promote orderly marketing by placing buyers and sellers on a more equal negotiation basis.

LPGMN reporters communicate with buyers and sellers of livestock, poultry, meat, eggs, grain, local products, and their respective commodities on a daily basis to accomplish LPGMN's mission. This communication and information gathering is accomplished through the use of telephone conversations, facsimile transmissions, face-to-face meetings, and email messages. The information provided by respondents initiates LPGMN reporting, which must be timely, accurate, unbiased, and continuous if it is to be meaningful to the industry. AMS collects information on price, supply, demand, trends, movement, and other information of livestock, poultry, meat, grain, eggs, local products, and their respective commodities. LPGMN uses one OMB approved form, PY–90: "Monthly Dried Egg Solids Stocks Report," to collect inventory information from commercially dried egg product plants throughout the U.S. Cooperating firms voluntarily submit this form to LPGMN primarily via email and facsimile transmissions.

This collection was previously titled "Livestock, Poultry, Meat, and Grain Market News Reports" (0186–0033), and AMS is proposing to retitle the collection as "Livestock, Poultry, and Grain Market News" collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.0600 hours per response.

Respondents: Business or other for-profit and farms.

Estimated Number of Respondents: 2,990.

Estimated Number of Responses per Respondent: 93.

Estimated Total Annual Responses: 279,119.

Estimated Total Annual Burden on Respondents: 16,110.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: May 10, 2016.

Elanor Starmer,

Administrator, Agricultural Marketing Service.

[FR Doc. 2016–11318 Filed 5–12–16; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0103]

General Conference Committee of the National Poultry Improvement Plan; Solicitation for Membership; Correction

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice; correction.

SUMMARY: We are correcting an error in a notice announcing that the Secretary of Agriculture is soliciting nominations for the election of members and alternates to the General Conference Committee of the National Poultry Improvement Plan. The notice was published in the **Federal Register** on March 1, 2016.

FOR FURTHER INFORMATION CONTACT: Dr. Denise L. Brinson, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, 1506 Klondike Road, Suite 101, Conyers, GA 30094–5173; phone (770) 922–3496; fax (770) 922–3498; email *denise.l.brinson@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION: In a notice[1] published in the **Federal Register** on March 1, 2016 (81 FR 10568, Docket No. APHIS–2015–0103), we announced that the Secretary of Agriculture is soliciting nominations for the election of members and alternates to the General Conference Committee (the Committee) of the National Poultry Improvement Plan.

In the notice, we stated that the terms will expire for three of the current regional members of the Committee as well as the member-at-large in July 2016. However, the term for the member-at-large does not expire until July 2018. The membership solicitation should have omitted the member-at-large.

Done in Washington, DC, this 9th day of May 2016.

Michael C. Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016–11314 Filed 5–12–16; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0102]

Notice of Availability of an Evaluation of the Classical Swine Fever, Swine Vesicular Disease, African Swine Fever, Foot-and-Mouth Disease, and Rinderpest Status of Malta

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that we are proposing to recognize the Republic of Malta as being free of swine vesicular disease, African swine fever, foot-and-mouth disease, and rinderpest subject to conditions in the regulations governing the importation of certain animals and animal products into the United States. We are also proposing adding the Republic of Malta to the APHIS-defined European classical swine fever region that is subject to conditions described in the regulations. We are proposing these actions based on a risk evaluation we have prepared in connection with this action, which we are making available for review and comment.

DATES: We will consider all comments that we receive on or before July 12, 2016.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0102.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2015–0102, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0102* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Chip Wells, Senior Staff Veterinarian, Regionalization Evaluation Services, National Import Export Services, VS, APHIS, USDA, 4700 River Road Unit 38, Riverdale, MD 20737–1231; *Chip.J.Wells@aphis.usda.gov;* (301) 851–3317.

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 94 (referred to below as the regulations) govern the importation of certain animals and animal products into the United States to prevent the introduction of various animal diseases, including African swine fever (ASF), classical swine fever (CSF), foot-and-mouth disease (FMD), swine vesicular disease (SVD), and rinderpest.[1] The regulations prohibit or restrict the importation of live ruminants and swine, and products from these animals, from regions where these diseases are considered to exist.

Within part 94, § 94.1 contains requirements governing the importation of ruminants and swine from regions

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[1] To view the notice and related documents, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0103.*

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[1] The World Organization for Animal Health (OIE) recognizes rinderpest as having been globally eradicated, and recommends that countries not impose any rinderpest-related conditions on import or transit of livestock and livestock products. In addition, the OIE recently delisted SVD as a disease of concern for international trade. However, APHIS continues to regulate for rinderpest and SVD through its import regulations for animals and animal products.

where rinderpest or FMD exists and the importation of the meat of any ruminants or swine from regions where rinderpest or FMD exists to prevent the introduction of either disease into the United States. We consider rinderpest and FMD to exist in all regions except those listed in accordance with paragraph (a) of that section as free of rinderpest and FMD.

Section 94.8 contains requirements governing the importation of pork and pork products from regions where ASF exists or is reasonably believed to exist.

Section 94.9 contains requirements governing the importation of pork and pork products from regions where CSF exists. Section 94.10 contains importation requirements for swine from regions where CSF is considered to exist and designates the Animal and Plant Health Inspection Service (APHIS)-defined European CSF region as a single region of low-risk for CSF. Section 94.31 contains requirements governing the importation of pork, pork products, and swine from the APHIS-defined European CSF region. We consider CSF to exist in all regions of the world except those listed in accordance with paragraph (a) of § 94.9[2] as free of the disease.

Section 94.11 of the regulations contains requirements governing the importation of meat of any ruminants or swine from regions that have been determined to be free of rinderpest and FMD, but that are subject to certain restrictions because of their proximity to or trading relationships with rinderpest- or FMD-affected regions. Such regions are listed in accordance with paragraph (a) of that section.

Section 94.12 of the regulations contains requirements governing the importation of pork or pork products from regions where SVD exists. We consider SVD to exist in all regions of the world except those listed in accordance with paragraph (a) of that section as free of SVD.

Section 94.13 contains importation requirements governing the importation of pork or pork products from regions that have been declared free of SVD as provided in § 94.12(a) but supplement their national pork supply by the importation of fresh (chilled or frozen) meat of animals from regions where SVD is considered to exist, or have a common border with such regions, or have trade practices that are less restrictive than are acceptable to the United States. Such regions are listed in accordance with paragraph (a) of § 94.13.

Section 94.14 states that no swine which are moved from or transit any region in which SVD is known to exist may be imported into the United States except wild swine imported in accordance with § 94.14(b).

Section 94.17 sets forth restrictions for importation of dry-cured pork products from regions where ASF, CSF, SVD, FMD, or rinderpest exists.

The regulations in 9 CFR part 92, § 92.2, contain requirements for requesting the recognition of the animal health status of a region (as well as for the approval of the export of a particular type of animal or animal product to the United States from a foreign region). If, after review and evaluation of the information submitted in support of the request, APHIS believes the request can be safely granted, APHIS will make its evaluation available for public comment through a document published in the **Federal Register**. Following the close of the comment period, APHIS will review all comments received and will make a final determination regarding the request that will be detailed in another document published in the **Federal Register**.

Under the current regulations, Malta is considered to be a region affected with CSF, SVD, ASF, FMD, and rinderpest. As such, APHIS restricts the importation of susceptible species and products derived from susceptible species from Malta.

In July 2006, the Government of the Republic of Malta requested that APHIS evaluate its CSF, SVD, ASF, FMD, and rinderpest status. In response to this request, we conducted a qualitative risk evaluation to evaluate Malta with respect to these diseases. This evaluation included site visits to farms and processing facilities in Malta, as well as examinations of Malta's capabilities with respect to veterinary control and oversight, disease history and vaccination, livestock demographics and traceability, epidemiological separation from potential sources of infection, disease surveillance, diagnostic laboratory capabilities, and emergency preparedness and response. Malta also provided additional information requested by APHIS in order to complete the evaluation in 2008 and 2014.

Based on the results of our evaluation, APHIS recognizes Malta to be free of SVD, ASF, FMD, and rinderpest, and low risk for CSF. APHIS has also determined that the surveillance, prevention, and control measures implemented by the European Union (EU) and Malta, an EU Member State since 2004, are sufficient to minimize the likelihood of introducing CSF, SVD, ASF, FMD, and rinderpest into the United States via imports of species or products susceptible to these diseases. Additionally, our determinations support adding Malta to the Web-based list of regions comprising the APHIS-defined European CSF region, which APHIS considers to be low risk for CSF, and to the respective Web-based lists of regions APHIS considers free of SVD, ASF, FMD, and rinderpest. Accordingly, we consider the risk of infected live swine and ruminants, or commodities derived from these species, entering the United States from Malta under mitigated conditions and exposing U.S. livestock to disease to be very low.

Therefore, in accordance with § 92.2(e), we are announcing the availability of our risk evaluation of the CSF, SVD, ASF, FMD, and rinderpest status of Malta for public review and comment. We are also announcing the availability of an environmental assessment (EA) and a finding of no significant impact (FONSI)[3] which have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provision of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). The evaluation, EA, and FONSI may be viewed on the *Regulations.gov* Web site or in our reading room. (Instructions for accessing *Regulations.gov* and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this notice.) The documents are also available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Information submitted in support of Malta's request is available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

After reviewing any comments we receive, we will announce our decision regarding the disease status of Malta under consideration with respect to CSF, SVD, ASF, FMD, and rinderpest and the import status of susceptible animals and products of such animals in a subsequent notice.

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[2] The list of regions comprising the APHIS-defined European CSF region and the lists of regions considered free of FMD, ASF, SVD, and rinderpest are located on the APHIS Web site at: *http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/importexport?1dmy&urile=wcm%3apath%3a%2Faphis_content_library%2Fsa_our_focus%2Fsa_animal_health%2Fsa_import_into_us%2Fct_animal_disease_status.*

[3] The FONSI for Malta incorporates by reference an EA prepared for Slovakia that addresses the potential environmental impacts of CSF, FMD, SVD, and rinderpest for Slovakia and other EU Member States.

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 9th day of May 2016.

Michael C. Gregoire,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016–11316 Filed 5–12–16; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission briefing.

DATES: Friday, May 20, 2016, at 9 a.m. EDT.

ADDRESSES: *Place:* National Place Building, 1331 Pennsylvania Ave. NW., 11th Floor, Suite 1150, Washington, DC 20245 (Entrance on F Street NW).

FOR FURTHER INFORMATION CONTACT: Gerson Gomez, Media Advisor at telephone: (202) 376–8371, TTY: (202) 376–8116 or email: *publicaffairs@usccr.gov.*

SUPPLEMENTARY INFORMATION: This briefing and business meeting are open to the public. The public may listen on the following toll-free number: 1–888–572–7034. Please provide the operator with conference ID number 7822144.

Hearing-impaired persons who will attend the briefing and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at signlanguage@usccr.gov at least seven business days before the scheduled date of the meeting. During the briefing, Commissioners will ask questions and discuss the briefing topic with the panelists. The public may submit written comments on the topic of the briefing to the above address for 30 days after the briefing. Please direct your comments to the attention of the "Staff Director" and clearly mark "Briefing Comments Inside" on the outside of the envelope. Please note we are unable to return any comments or submitted materials. Comments may also be submitted by email to *EdFundComments@usccr.gov.*

Briefing Agenda

Topic: Public Education Funding Inequality in an Era of Increasing Concentration of Poverty and Resegregation

I. Introductory Remarks—9:00 a.m.–9:15 a.m.

II. Panel One: Introduction to Public School Financing and Equity—9:15 a.m.–10:35 a.m.

Speakers' Remarks

- Joseph Rogers, Director of Public Engagement/Senior Researcher, Campaign for Educational Equity, Teachers College, Columbia University
- Danielle Farrie, Research Director, Education Law Center
- Beth Schiavano-Narvaez, Superintendent, Hartford, CT Public Schools
- David Volkman, Executive Assistant Secretary of Education for Pennsylvania
- Jamella Miller, Parent, William Penn School District

Questions from Commissioners

III. Panel Two: Funding Impact on Low-Income Children of Color—10:35 a.m.–11:45 a.m.

Speakers' Remarks

- Wade Henderson, President, Leadership Conference on Civil and Human Rights
- Fatima Goss Graves, Senior Vice President for Program, National Women's Law Center
- Becky Pringle, Vice President, National Education Association
- Jessie Brown, Senior Counsel to the Assistant Secretary, Office for Civil Rights, Department of Education

Questions from Commissioners

IV. Break 11:45 a.m.–12:45 p.m.

V. Panel Three: The Role and Effect of Money on Outcomes—12:45 p.m.–2:05 p.m.

Speakers' Remarks

- Jesse Rothstein, Professor of Public Policy and Economics, University of California, Berkeley
- Sean P. Corcoran, Associate Professor of Economics, New York University
- Steven Rivkin, Professor of Economics, University of Illinois at Chicago
- Doug Mesecar, Vice President, American Action Forum
- Gerard Robinson, Resident Fellow, Education Policy Studies, American Enterprise Institute

Questions from Commissioners

VI. Panel Four: Segregation: The Nexus Between School Funding and Housing—2:05 p.m.–3:25 p.m.

Speakers' Remarks

- Jacob Vigdor, Professor of Public Policy and Governance, University of Washington
- Phil Tegeler, Executive Director, Poverty and Race Research Action Council
- Catherine Brown, Vice President, Center for American Progress
- Monique Lin-Luse, Special Counsel, NAACP Legal Defense and Education Fund, Inc.
- Katherine M. O'Regan, Assistant Secretary for Policy Development and Research, Department of Housing and Urban Development

Questions from Commissioners

VII. Break 3:25 p.m.–3:35 p.m.

VIII. Panel Five: Federal Government on Equitable Funding—3:35 p.m.–4:48 p.m.

Speakers' Remarks

- Becky Monroe, Senior Counsel, Office of the Assistant Attorney General, Civil Rights Division, Department of Justice
- Honorable Bobby Scott (D–VA) or Designee
- Tanya Clay House, Deputy Assistant Secretary for P–12 Education, Office of Planning, Evaluation and Policy Development, Department of Education
- Ary Amerikaner, Deputy Assistant Secretary for Policy and Strategic Initiatives, Office of Elementary and Secondary Education, Department of Education

Questions from Commissioners

IX. Adjourn Briefing

Dated: May 11, 2016.

David Mussatt,

Regional Programs Unit Chief, U.S. Commission on Civil Rights.

[FR Doc. 2016–11451 Filed 5–11–16; 11:15 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration (ITA).

Title: Procedures for Considering Requests and Comments from the Public for Textile and Apparel Safeguard Actions on Imports from Oman.

Form Number(s): None.

OMB Control Number: 0625–0266.

Type of Request: Regular submission.

Burden Hours: 24.

Number of Respondents: 6 (1 for Request; 5 for Comments).

Average Hours Per Response: 4 hours for a Request; and 4 hours for a Comment.

Needs and Uses: Title III, Subtitle B, Section 321 through Section 328 of the United States-Oman Free Trade Agreement Implementation Act (the "Act") implements the textile and apparel safeguard provisions, provided for in Article 3.1 of the United States-Oman Free Trade Agreement (the "Agreement"). This safeguard mechanism applies when, as a result of the elimination of a customs duty under the Agreement, an Omani textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage or actual threat thereof to a U.S. industry producing a like or directly competitive article. In these circumstances, Article 3.1 permits the United States to increase duties on the imported article from Oman to a level that does not exceed the lesser of the prevailing U.S. normal trade relations (NTR)/most-favored-nation (MFN) duty rate for the article or the U.S. NTR/MFN duty rate in effect on the day before the Agreement entered into force.

The Statement of Administrative Action accompanying the Act provides that the Committee for the Implementation of Textile Agreements (CITA) will issue procedures for requesting such safeguard measures, for making its determinations under section 322(a) of the Act, and for providing relief under section 322(b) of the Act.

In Proclamation No. 8332 (73 FR 80289, December 31, 2008), the President delegated to CITA his authority under Subtitle B of Title III of the Act with respect to textile and apparel safeguard measures.

CITA must collect information in order to determine whether a domestic textile or apparel industry is being adversely impacted by imports of these products from Oman, thereby allowing CITA to take corrective action to protect the viability of the domestic textile or apparel industry, subject to section 322(b) of the Act.

Affected Public: Individuals or households; business or other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to OIRA *Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: May 9, 2016.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2016–11241 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket Number: 160429380–6380–01]

RIN 0660–XC025

First Responder Network Authority; Notice of Availability of a Draft Programmatic Environmental Impact Statement for the East Region of the Nationwide Public Safety Broadband Network and Notice of Public Meetings; Correction

AGENCY: First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice announcing availability of a draft programmatic environmental impact statement and of public meetings; correction.

SUMMARY: The First Responder Network Authority ("FirstNet") published a notice in the **Federal Register** of May 6, 2016 announcing the availability of the Draft Programmatic Environmental Impact Statement for the East Region ("Draft PEIS"). FirstNet also announced a series of public meetings to be held throughout the East Region to receive comments on the Draft PEIS. The Draft PEIS evaluates the potential environmental impacts of the proposed nationwide public safety broadband network in the East Region, composed of Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. The May 6, 2016 notice contained an incorrect location for the public meeting to be held in New York and is corrected by this notice.

DATES: Submit comments on the Draft PEIS for the East Region on or before July 6, 2016. FirstNet will also hold public meetings in each of the 13 states and the District of Columbia. See **SUPPLEMENTARY INFORMATION** section for meeting dates.

ADDRESSES: At any time during the public comment period, members of the public, public agencies, and other interested parties are encouraged to submit written comments, questions, and concerns about the project for FirstNet's consideration or to attend any of the public meetings. Written comments may be submitted electronically via *www.regulations.gov,* FIRSTNET–2016–0002, or by mail to Amanda Goebel Pereira, NEPA Coordinator, First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce, 12201 Sunrise Valley Drive, M/S 243, Reston, VA 20192. Comments received will be made a part of the public record and may be posted to FirstNet's Web site (*www.firstnet.gov*) without change. Comments should be machine readable and should not be copy-protected. All personally identifiable information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. The Draft PEIS is available for download from *www.regulations.gov* FIRSTNET–2016–0002. A CD of this document is also available for viewing at public libraries (see Chapter 22 of the Draft PEIS for the complete distribution list). See **SUPPLEMENTARY INFORMATION** section for public meeting addresses.

FOR FURTHER INFORMATION CONTACT: For more information on the Draft PEIS, contact Amanda Goebel Pereira, NEPA Coordinator, First Responder Network Authority, National Telecommunications and Information Administration, U.S. Department of Commerce, 12201 Sunrise Valley Drive, M/S 243, Reston, VA 20192.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of May 6, 2016, in FR Doc. 81–27409, on page 27410, in the first column, correct the fourth bullet point under the "Public Meetings" section of the **SUPPLEMENTARY INFORMATION** section to read:

- New York City, NY, May 24, 2016, from 4 p.m. to 8 p.m., New York Marriott Marquis, 1535 Broadway, New York, NY 10036

Background

The Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96, Title VI, 126 Stat. 156 (codified at 47 U.S.C. 1401 *et seq.*)) (the "Act") created and authorized FirstNet to take all actions necessary to ensure the deployment, operation, and maintenance of an interoperable, nationwide public safety broadband network ("NPSBN") based on a single, national network architecture. The Act meets a longstanding and critical national infrastructure need, to create a single, nationwide network that will, for the first time, allow police officers, fire fighters, emergency medical service professionals, and other public safety entities to effectively communicate with each other across agencies and jurisdictions. The NPSBN is intended to enhance the ability of the public safety community to perform more reliably, effectively, and safely; increase situational awareness during an emergency; and improve the ability of the public safety community to effectively engage in those critical activities.

The National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) ("NEPA") requires federal agencies to undertake an assessment of environmental effects of their proposed actions prior to making a final decision and implementing the action. NEPA requirements apply to any federal project, decision, or action that may have a significant impact on the quality of the human environment. NEPA also establishes the Council on Environmental Quality ("CEQ"), which issued regulations implementing the procedural provisions of NEPA (see 40 CFR parts 1500–1508). Among other considerations, CEQ regulations at 40 CFR 1508.28 recommend the use of *tiering* from a "broader environmental impact statement (such as a national program or policy statements) with subsequent narrower statements or environmental analysis (such as regional or basin wide statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared."

Due to the geographic scope of FirstNet (all 50 states, the District of Columbia, and five territories) and the diversity of ecosystems potentially traversed by the project, FirstNet has elected to prepare five regional PEISs. The five PEISs will be divided into the East, Central, West, South, and Non-Contiguous Regions. The East Region consists of Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia. The Draft PEIS analyzes potential impacts of the deployment and operation of the NPSBN on the natural and human environment in the East Region, in accordance with FirstNet's responsibilities under NEPA.

Dated: May 10, 2016.

Amanda Goebel Pereira,

NEPA Coordinator, First Responder Network Authority.

[FR Doc. 2016–11370 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–TL–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–31–2016]

Foreign-Trade Zone 20—Norfolk, Virginia; Application for Reorganization (Expansion of Service Area) Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Virginia Port Authority, grantee of Foreign-Trade Zone 20, requesting authority to reorganize the zone to expand its service area under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on May 9, 2016.

FTZ 20 was approved by the Board on April 15, 1975 (Board Order 105, 40 FR 17884, April 23, 1975) and reorganized under the ASF on February 28, 2014 (Board Order 1933, 79 FR 14214–14215, March 13, 2014). The zone currently has a service area that includes the Counties of Accomack (partial), Gloucester, Isle of Wight, James City, Mathews, Northampton, Southampton, Sussex, Surry and York, Virginia, and the Cities of Chesapeake, Franklin, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach and Williamsburg, Virginia, within and adjacent to the Norfolk-Newport News Customs and Border Protection port of entry.

The applicant is now requesting authority to expand the service area of the zone to include Elizabeth City, North Carolina, and the Counties of Camden, Chowan, Currituck, Gates, Hertford, Pasquotank and Perquimans, North Carolina, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The application indicates that the proposed expanded service area is adjacent to the Norfolk-Newport News Customs and Border Protection port of entry.

In accordance with the FTZ Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is July 12, 2016. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 27, 2016.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the "Reading Room" section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz*. For further information, contact Kathleen Boyce at *Kathleen.Boyce@trade.gov* or (202) 482–1346.

Dated: May 9, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–11391 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–811]

Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation; Preliminary Results of Antidumping Duty Administrative Review; Preliminary Determination of No Shipments; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on solid fertilizer grade ammonium nitrate (ammonium nitrate) from the Russian Federation. The review covers two producer/exporters of the subject merchandise, JSC Acron and its affiliate JSC Dorogobuzh (collectively, Acron) and MCC EuroChem and its affiliates OJSC NAK Azot and OJSC Nevinnomysskiy Azot (collectively, EuroChem). The period of review (POR) is April 1, 2014, through March 31, 2015. We preliminarily determine that sales of subject merchandise to the United States have not been made at prices below normal value (NV). The Department preliminarily finds that EuroChem made no shipments of subject merchandise during the POR. We invite all interested parties to comment on these preliminary results.

DATES: *Effective Date:* May 13, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or David Crespo, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3874, or (202) 482–3693, respectively.

SUPPLEMENTARY INFORMATION: As explained in the memorandum from the Acting Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll all administrative deadlines due to the recent closure of the Federal Government. All deadlines in this segment of the proceeding have been extended by four business days. The revised deadline for the preliminary results of this review is now May 5, 2016.[1]

Scope of the Order

The merchandise subject to this order is solid, fertilizer grade ammonium nitrate products. The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings 3102.30.00.00 and 3102.290000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise within the scope is dispositive.[2]

Methodology

The Department is conducting this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is attached as an Appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and it is available to all paries in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Determination of No Shipments

On June 25, 2015, EuroChem properly filed a statement reporting that it made no shipments of subject merchandise to the United States during the POR. Additionally, our inquiry to U.S. Customs and Border Protection (CBP) did not identify any POR entries of EuroChem's subject merchandise. Based on the foregoing, the Department preliminarily determines that EuroChem did not have any reviewable transactions during the POR. For additional information regarding this determination, see the Preliminary Decision Memorandum. Consistent with our practice, we are not preliminarily rescinding the review with respect to EuroChem but, rather, we will complete the review with respect to this company and issue appropriate instructions to CBP based on the final results of this review.[3]

Preliminary Results of the Review

The Department preliminarily determines that the following weighted-average dumping margin exists:

Producer/exporter	Weighted-average dumping margin (percent)
JSC Acron/JSC Dorogobuzh	0.00

Disclosure and Public Comment

The Department intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days after the date of publication of this notice.[4] Interested parties may submit cases briefs to the Department no later than 30 days after the date of publication of this notice.[5] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the time limit for filing case briefs.[6] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[7] Case and rebuttal briefs should be filed using ACCESS.[8]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) The number of participants; and (3) A list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.[9]

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[1] *See* Memorandum to the Record from Ron Lorentzen, Acting A/S for Enforcement & Compliance, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During Snowstorm Jonas," dated January 27, 2016.

[2] For a complete description of the scope of the order, *see* the memorandum from Gary Taverman, Associate Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled, "Decision Memorandum for the Preliminary Results of the 2014–2015 Administrative Review of the Antidumping Duty Order on Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation," (Preliminary Decision Memorandum), dated concurrently with and hereby adopted by this notice.

[3] *See e.g., Certain Frozen Warmwater Shrimp From Thailand; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, Preliminary Determination of No Shipments; 2012–2013,* 79 FR 15951, 15952 (March 24, 2014), unchanged in *Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission of Review; 2012–2013,* 79 FR at 51306 (August 28, 2014).

[4] *See* 19 CFR 351.224(b).

[5] *See* 19 CFR 351.309(c)

[6] *See* 19 CFR 351.309(d).

[7] *See* 19 CFR 351.309(c)(2) and (d)(2).

[8] *See* 19 CFR 351.303.

The Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h), unless this deadline is extended.

Assessment Rates

Upon issuance of the final results, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[10] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis*. Where the respondent's weighted-average dumping margin is zero or *de minimis*, or an importer-specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The Department clarified its "automatic assessment" regulation on May 6, 2003.[11] This clarification will apply to entries of subject merchandise during the POR produced by the respondents for which the company did not know that the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Acron will be equal to the weighted-average dumping margins established in the final results of this administrative review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for merchandise exported by EuroChem or by manufacturers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 253.98 percent, the all-others rate established in the order.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 5, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Preliminary Determination of No Shipments
V. Discussion of the Methodology
  a. Normal Value Comparisons
  b. Determination of Comparison Method
  c. Results of the Differential Pricing Analysis
  d. Product Comparisons
  e. Date of Sale
  f. Constructed Export Price
  g. Normal Value
  h. Currency Conversion
VI. Recommendation

[FR Doc. 2016–11388 Filed 5–12–16; 8:45 am]

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[9] *See* 19 CFR 351.310(d).

[10] *See* 19 CFR 351.212(b)(1).

[11] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See Termination of the Suspension Agreement on Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation and Notice of Antidumping Duty Order,* 76 FR 23569, 23570 (April 27, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809]

Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from Hyundai Steel, a producer/exporter of circular welded non-alloy steel pipe (CWP) from the Republic of Korea, and pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216 and 351.221(c)(3)(ii), the Department is initiating a changed circumstances review and issuing this notice of preliminary results. We preliminarily determine that Hyundai Steel is the successor-in-interest to Hyundai HYSCO (HYSCO).

DATES: *Effective Date:* May 13, 2016.

FOR FURTHER INFORMATION CONTACT: Joseph Shuler, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1293.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 1992, the Department published the antidumping duty order for circular welded non-alloy steel pipe from the Republic of Korea.[1]

On February 24, 2016, Hyundai Steel informed the Department that effective July 1, 2015, it had merged with

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[1] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992).

HYSCO,[2] and requested that: (1) The Department conduct a changed circumstances review under 19 CFR 351.216(b) to determine that it is the successor-in-interest to HYSCO for purposes of determining antidumping duty cash deposits and liabilities; and (2) the Department conduct the changed circumstances review on an expedited basis under 19 CFR 351.221(c)(3)(ii). No interested parties commented on Hyundai Steel's request.

Scope of the Order

The merchandise subject to the order is circular welded non-alloy steel pipe and tube, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low-pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air-conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and as support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and other related industries. Unfinished conduit pipe is also included in the order.

All carbon-steel pipes and tubes within the physical description outlined above are included within the scope of the order except line pipe, oil-country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.[3]

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090. Although the HTSUS numbers are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

All carbon-steel pipes and tubes within the physical description outlined above are included within the scope of the order except line pipe, oil-country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) numbers: 7306.30.1000, 7306.30.5025, 7306.30.5032, 7306.30.5040, 7306.30.5055, 7306.30.5085, and 7306.30.5090. Although the HTSUS numbers are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Initiation and Preliminary Results

Pursuant to section 751(b)(1) of the Act, the Department will conduct a changed circumstances review upon receipt of a request from an interested party or receipt of information concerning an antidumping duty order which demonstrates changed circumstances sufficient to warrant a review of the order. As noted above in the "Background" section, we received information indicating that on July 1, 2015, Hyundai Steel merged with HYSCO. The information further indicates that at that time, Hyundai Steel assumed all of HYSCO's operations for the production and sale of subject merchandise. This constitutes changed circumstances warranting a review of this order.[4] Therefore, in accordance with section 751(b)(1) of the Act, we are initiating a changed circumstances review based upon the information contained in Hyundai Steel's submission.[5]

Section 351.221(c)(3)(ii) of the Department's regulations permits the Department to combine the notice of initiation of a changed circumstances review and the preliminary results of review if the Department concludes that expedited action is warranted. In this instance, we find that expedited action is warranted, and are issuing a combined notice of initiation and preliminary results based on the information placed on the record by Hyundai Steel.

In making a successor-in-interest determination, the Department examines several factors including, but not limited to, whether there were changes in: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base.[6] While no single factor or combination of these factors will necessarily provide a dispositive indication of a successor-in-interest relationship, the Department will generally consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[7] Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the former company, the Department will accord the new company the same treatment under the antidumping duty order as its predecessor.

In its submission, Hyundai Steel explained that it merged with HYSCO effective July 1, 2015. Hyundai Steel stated that the merger was approved by shareholders of both companies, but procedurally, the merger took the form of an "absorption" through which Hyundai Steel "absorbed" HYSCO, which no longer exists as a corporate entity.[8] Hyundai Steel claimed that since the effective date of the merger, Hyundai Steel is operating essentially the same business as HYSCO did, and that there have been no significant changes in management or production facilities, with only minimal impact on the company's supplier relationships and its customer base with respect to the production and sale of the subject merchandise.[9] Hyundai Steel submitted detailed documentation relating to the merger of the two companies (*e.g.*, shareholder meeting report, articles of incorporation, and a copy of the merger announcement).[10]

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[2] *See* letter from Hyundai Steel to the Department, "Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Request for Changed Circumstances Review (CCR Request), dated February 24, 2016.

[3] *See Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube from Brazil, the Republic of Korea, Mexico, and Venezuela,* 61 FR 11608 (March 21, 1996). In accordance with this determination, pipe certified to the API 5L line-pipe specification and pipe certified to both the API 5L line-pipe specifications and the less-stringent ASTM A–53 standard-pipe specifications, which falls within the physical parameters as outlined above, and entered as line pipe of a kind used for oil and gas pipelines, is outside of the scope of the AD order.

[4] *See* 19 CFR 351.216(d).

[5] *See* the CCR Request.

[6] *See, e.g., Pressure Sensitive Plastic Tape from Italy: Preliminary Results of Antidumping Duty Changed Circumstances Review,* 75 FR 8925 (Feb. 26, 2010), unchanged in *Pressure Sensitive Plastic Tape From Italy: Final Results of Antidumping Duty Changed Circumstances Review,* 75 FR 27706 (May 18, 2010); *Brake Rotors From the People's Republic of China: Final Results of Changed Circumstances Antidumping Duty Administrative Review,* 70 FR 69941 (November 18, 2005) (*Brake Rotors*), citing *Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review,* 57 FR 2460 (May 13, 1992); and *Structural Steel Beams from Korea: Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review,* 66 FR 15834 (March 21, 2001).

[7] *See, e.g., Brake Rotors.*

[8] *See* CCR Request at 2.

[9] *See* CCR Request at 3–4.

[10] *Id.* at 3 and Exhibits 1 through 14.

With respect to management, Hyundai Steel retained its board of directors and discharged the board of directors of HYSCO, with the exception of Mr. Heon-seok Lee, who was a board member and executive (Chief Director of Pipe Factory Manufacturing Support Group) of HYSCO and who remains with Hyundai Steel as a member of the board of directors and an executive (Chief Director of Pipe Factory and Head of Automotive Parts Production Office).[11] In addition, 12 of 17 HYSCO executives remain at Hyundai Steel, nine of whom continue to work in business units similar to the HYSCO units where they were employed.

Hyundai Steel further explained that its current organizational structure is substantially similar to that of HYSCO; the only difference is that the management team of the former company is now integrated into the larger management structure of Hyundai Steel.[12] Hyundai Steel explained that the only changes within the organizational structure are that certain business units (of HYSCO) were divided and integrated into Hyundai Steel's business units.[13] The documentation submitted in the CCR Request demonstrates that the units specifically related to the production and sale of the subject merchandise by Hyundai Steel remain the same, other than changes in the names of the plants and divisions, as they were for HYSCO.[14]

Based on this information, and in particular, based on the fact that Hyundai Steel's management team continues to include the majority of the former HYSCO managers, we preliminarily find that the reorganization resulting from the merger of the two companies did not result in management that was materially dissimilar with respect to the subject merchandise.

With respect to production facilities, Hyundai Steel reported that there have been no changes.[15] Hyundai Steel provided copies of HYSCO's company brochure and noted that the location of the production facility, in Ulsan, Korea, also remains unchanged.[16] Based on this information, we preliminarily find that the merger did not result in material changes to the production of the subject merchandise.

With respect to suppliers and customers, Hyundai Steel provided information that demonstrates that there are only marginal differences to its supplier relationships. Specifically, prior to the merger, Hyundai Steel was HYSCO's largest supplier of hot-rolled coil; after the merger, Hyundai Steel continues to be the largest supplier of this input to the production of the subject merchandise. Although other suppliers of hot-rolled coil to HYSCO prior to the merger are no longer providing hot-rolled coil, Hyundai Steel explained that these suppliers provided only a small portion of the input to HYSCO before the merger.[17] Hyundai Steel explained that the merger had no effect on the customers or sales practices in the U.S. (other than a short interruption in sales) or domestic markets because Hyundai Steel is now selling the subject merchandise to the same customers in exactly the same manner as HYSCO did. Hyundai Steel elaborated that the same customers accounted for 98 percent of the customer base following the merger.

Based on our consideration of the totality of the evidence provided by Hyundai Steel, we preliminarily determine that Hyundai Steel is the successor-in-interest to HYSCO, for purposes of the application of the antidumping duty order. Specifically, with respect to the production and sale of the subject merchandise, we find that the merger of these two companies resulted in no significant changes to management or production facilities. Additionally, the minor changes in supplier relationships and customers that Hyundai Steel identified indicate that there had been no material change in suppliers of inputs or services related to the production, sale and distribution of the subject merchandise, and thus do not weigh against finding that Hyundai Steel is the successor-in-interest to HYSCO. Thus, Hyundai Steel operates as the same business entity as HYSCO with respect to the subject merchandise. If the Department upholds this preliminary determination in the final results, Hyundai Steel will retain the antidumping duty deposit rate currently assigned to HYSCO with respect to the subject merchandise (*i.e.*, 3.69 percent). If these preliminary results are adopted in the final results of this changed circumstances review, we will instruct U.S. Customs and Border Protection to suspend liquidation of entries of CWP made by Hyundai Steel, effective the date of publication of the final results.

Public Comment

Interested parties may submit case briefs and/or written comments not later than 14 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, which must be limited to issues raised in such briefs or comments, may be filed not later than 21 days after the date of publication of this notice.[18] Parties who submit case or rebuttal briefs are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Parties submitting briefs should do so pursuant to the Department's electronic filing system, ACCESS.[19] Electronically-filed documents must be received successfully in their entirety by 5:00 p.m. Eastern Time on the due dates established above.[20]

Any interested party may request a hearing within 14 days of publication of this notice.[21] Parties will be notified of the time and date of any hearing if requested.[22]

Consistent with 19 CFR 351.216(e), we will issue the final results of this changed circumstances review no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary finding. This initiation and preliminary results of review notice is published in accordance with sections 751(b)(l) and 777(i)(l) of the Act and 19 CFR 351.216, 19 CFR 351.221(b)(l), (4), and 19 CFR 351.222(g).

Dated: May 9, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–11390 Filed 5–12–16; 8:45 am]

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[11] *Id.* at 8 and Exhibit 3.

[12] *Id.* at 7.

[13] *Id.* at 7.

[14] *See* CCR Request at 7–8.

[15] *Id.* at 9.

[16] *Id.*

[17] *Id.* at 8–9.

[18] See 19 CFR 351.309(d).

[19] *See* 19 CFR 351.303(f).

[20] *See* 19 CFR 351.303(b)(1).

[21] *See* 19 CFR 351.310(c).

[22] *See* 19 CFR 351.310(d).

DEPARTMENT OF COMMERCE

International Trade Administration

Meeting of the President's Export Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting by teleconference.

SUMMARY: The President's Export Council (Council) will hold an open call to present observations from a recent trip to Cuba by the Council's Chair and Vice Chair and to deliberate a recommendation related to Cuba. The final agenda will be posted at least one week in advance of the meeting on the

Council's Web site at *http://trade.gov/pec.*

DATES: June 8, 2016 at 10:00 a.m. EDT. The deadline for members of the public to register, including requests for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. EDT on June 6, 2016.

ADDRESSES: Via teleconference. The call-in number and passcode will be provided by email to registrants. Requests to register (including for auxiliary aids) and any written comments should be submitted to Tricia Van Orden, Executive Secretary, President's Export Council, electronically via email to *tricia.vanorden@trade.gov* or via letter to Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230. Members of the public are encouraged to submit registration requests and written comments via email to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Tricia Van Orden, Executive Secretary, President's Export Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: 202–482–5876, email: *tricia.vanorden@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The President's Export Council was first established by Executive Order on December 20, 1973 to advise the President on matters relating to U.S. export trade and to report to the President on its activities and recommendations for expanding U.S. exports and was reconstituted pursuant to Executive Order 12131 of May 4, 1979. The President's Export Council was renewed most recently by Executive Order 13708 of September 30, 2015, for the two-year period ending September 30, 2017. This Committee is established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App.

Public Participation: The meeting will be open to the public and will be accessible to people with disabilities. All listeners are required to register in advance by sending an electronic request by email to *tricia.vanorden@trade.gov* or by sending a paper request to the address listed above. Requests must be received by 5:00 p.m. EDT on June 6, 2016. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted, but may be impossible to fill.

Public Submissions: The public is invited to submit written statements to the President's Export Council. Statements must be received by 5:00 p.m. EDT on June 6, 2016, by either of the following methods:

a. Electronic Submissions

Submit statements electronically to Tricia Van Orden, Executive Secretary, President's Export Council, via email: *tricia.vanorden@trade.gov.*

b. Paper Submissions

Send paper statements to Tricia Van Orden, Executive Secretary, President's Export Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230.

Statements will be provided to the members in advance of the meeting for consideration and will be posted on the President's Export Council Web site (*http://trade.gov/pec*) without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make publicly available.

Meeting Recording: A recording of the Council's call will be available within ninety (90) days of the meeting on the Council's Web site at *http://trade.gov/pec.*

Dated: May 11, 2016.

Tricia Van Orden,

Executive Secretary, President's Export Council.

[FR Doc. 2016–11485 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–932]

Certain Steel Threaded Rod From the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the "Department") is conducting the sixth administrative review of the antidumping duty order on certain steel threaded rod ("STR") from the People's Republic of China ("PRC"),[1] for the period of review ("POR"), April 1, 2014, to March 31, 2015. The Department selected two respondents for individual review, Zhejiang New Oriental Fastener Co., Ltd. ("New Oriental"), and the RMB/IFI Group.[2] The Department preliminarily determines that New Oriental sold subject merchandise in the United States at prices below normal value ("NV") and that the RMB/IFI Group did not sell subject merchandise in the United States at prices below NV. If these preliminary results are adopted in the final results, the Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries of subject merchandise during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* May 13, 2016.

FOR FURTHER INFORMATION CONTACT: Jerry Huang or Andrew Devine, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4047 or (202) 482–0238, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise covered by the order includes steel threaded rod. The subject merchandise is currently classifiable under subheading 7318.15.5051, 7318.15.5056, 7318.15.5090, and 7318.15.2095 of the United States Harmonized Tariff Schedule ("HTSUS"). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.[3]

Partial Rescission of the Administrative Review

On April 1, 2015, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the AD order on certain steel threaded rod.[4] The Department received multiple timely requests for an administrative review of the AD order on certain steel threaded rod and on May 26, 2015, in accordance with section 751(a) of the Tariff Act of 1930, as amended ("the Act"), the Department published in the **Federal Register** a notice of the initiation of an administrative review of that order.[5] The administrative review was initiated with respect to 91 companies or groups of companies on June 24, 2015, Vulcan Threaded Products, Inc. ("Petitioner") withdrew its request for an administrative review on 83 companies.[6]

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[1] *See Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 17154 (April 14, 2009) ("*Order*").

[2] RMB Fasteners Ltd., IFI & Morgan Ltd., and Jiaxing Brother Standard Part Co., Ltd. (collectively "the RMB/IFI Group").

[3] For a full description of the scope of the *Order, see* Memorandum from Christian Marsh, Deputy Assistant Secretary, AD/CVD Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Decision Memorandum for Preliminary Results of Sixth Antidumping Duty Administrative Review: Certain Steel Threaded Rod from the People's Republic of China" ("Preliminary Decision Memorandum") (May 5, 2016).

[4] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 80 FR 17392 (April 1, 2015).

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party who requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. Petitioner timely withdrew its request for an administrative review of the 83 companies listed in the Appendix I. Petitioner was the only party to request a review of these companies. Accordingly, the Department is rescinding this review, in part, with respect to these entities, in accordance with 19 CFR 351.213(d)(1).[7]

PRC-Wide Entity

Of the eight companies for which requests for review remain, two are the mandatory respondents New Oriental and the RMB/IFI Group which have demonstrated eligibility for separate rate. The remaining six companies are not eligible for separate rate status or rescission, as they did not submit completed separate rate applications or certifications.

The Department's change in policy regarding conditional review of the PRC-wide entity applies to this administrative review.[8] Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because no party requested a review of the PRC-wide entity in this review, the PRC-wide entity is not under review and therefore its rate is not subject to change (*i.e.*, 206 percent).[9] Accordingly, the remaining six companies subject to this review that are not eligible for separate rate status or rescission are determined to be part of the PRC-wide entity. These companies are: Brother Holding Group Co., Ltd.; Jiaxing Xinyue Standard Part Co., Ltd.; Zhejiang Heiter Industries Co., Ltd.; Zhejiang Heiter MFG & Trade Co., Ltd.; Zhejiang Junyue Standard Part Co., Ltd.; and Zhejiang Morgan Brother Technology Co., Ltd.

Methodology

The Department is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the "Act"). Export prices have been calculated in accordance with section 772 of the Act. Because the PRC is a non-market economy ("NME") within the meaning of section 771(18) of the Act, NV has been calculated in accordance with section 773(c) of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum can be found at Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS"). ACCESS is available to registered users at *http://access.trade.gov,* and is available to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.enforcement.trade.gov/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist for the period April 1, 2014, through March 31, 2015:

Exporter	Weighted-average margin (*Ad valorem*)
IFI & Morgan Ltd. and RMB Fasteners Ltd. (collectively, the RMB/IFI Group)	0.0
Zhejiang New Oriental Co., Ltd.	12.10

Disclosure, Public Comment and Opportunity To Request a Hearing

The Department will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Interested parties may submit case briefs within 30 days after the date of publication of these preliminary results of review.[10] Rebuttals to case briefs, which must be limited to issues raised in the case briefs, must be filed within five days after the time limit for filing case briefs.[11] Parties who submit arguments are requested to submit with the argument (a) a statement of the issue, (b) a brief summary of the argument, and (c) a table of authorities.[12] Parties submitting briefs should do so pursuant to the Department's electronic filing system, ACCESS.

Any interested party may request a hearing within 30 days of publication of this notice.[13] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.[14]

The Department intends to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, unless extended, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[15] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review.

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[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 80 FR 30041, 30046–47 (May 26, 2015).

[6] *See* Letter to the Department from Petitioner, Re: Sixth Administrative Review of Certain Steel Threaded Rod from China—Petitioner's Withdrawal of Review Requests for Specific Companies (June 24, 2015).

[7] *See* Appendix I.

[8] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[9] *See Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013,* 79 FR 71743, 71744 and accompanying Issues and Decision Memorandum.

[10] *See* 19 CFR 351.309(c)(1)(ii).

[11] *See* 19 CFR 351.309(d)(1)–(2).

[12] *See* 19 CFR 351.309(c)(2), (d)(2).

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.310(d).

For any individually examined respondent whose weighted average dumping margin is above *de minimis* (*i.e.*, 0.50 percent) in the final results, the Department will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of sales, in accordance with 19 CFR 351.212(b)(1). Where an importer- (or customer-) specific *ad valorem* rate is greater than *de minimis*, the Department will instruct CBP to collect the appropriate duties at the time of liquidation.[16] Where either a respondent's weighted average dumping margin is zero or *de minimis*, or an importer- (or customer-) specific *ad valorem* is zero or *de minimis*, the Department will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[17] We intend to instruct CBP to liquidate entries containing subject merchandise exported by the PRC-wide entity at the PRC-wide rate.

Pursuant to the Department's assessment practice in NME cases, for entries that were not reported in the U.S. sales databases submitted by companies individually examined during the administrative review, the Department will instruct CBP to liquidate such entries at the PRC-wide rate. Additionally, if the Department determines that an exporter had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.*, at that exporter's rate) will be liquidated at the PRC-wide rate.[18] The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For the companies listed above that have a separate rate, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis*, then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter.

These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: May 5, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

(1) Aerospace Precision Corp. (Shanghai) Industry Co., Ltd.
(2) Aihua Holding Group Co., Ltd.
(3) Autocraft Industry (Shanghai) Ltd.
(4) Autograft Industry Ltd.
(5) Billion Land Ltd.
(6) Bolt MFG. Trade Ltd.
(7) C and H International Corporation
(8) Certified Products International Inc.
(9) Changshu City Standard Parts Factory
(10) China Friendly Nation Hardware Technology Limited
(11) EC International (Nantong) Co., Ltd.
(12) Fastco (Shanghai) Trading Co., Ltd.
(13) Fasten International Co., Ltd.
(14) Fastwell Industry Co., Ltd.
(15) Fuda Xiongzhen Machinery Co., Ltd.
(16) Fuller Shanghai Co., Ltd.
(17) Gem-Year Industrial Co., Ltd.
(18) Guangdong Honjinn Metal & Plastic Co., Ltd.
(19) Haiyan Da YU Fasteners Co., Ltd.
(20) Haiyan Evergreen Standard Parts Co., Ltd.
(21) Haiyan Hurras Import & Export Co., Ltd.
(22) Haiyan Jianhe Hardware Co., Ltd.
(23) Haiyan Julong Standard Part Co., Ltd.
(24) Hangzhou Everbright Imp. & Exp. Co,. Ltd.
(25) Hangzhou Grand Imp. & Exp. Co., Ltd.
(26) Hangzhou Great Imp. & Exp. Co., Ltd.
(27) Hangzhou Lizhan Hardware Co., Ltd.
(28) Hangzhou Tongwang Machinery Co., Ltd.
(29) Jiangsu Zhongweiyu Communication Equipment Co., Ltd.
(30) Jiashan Steelfit Trading Co., Ltd.
(31) Jiashan Zhongsheng Metal Products Co., Ltd.
(32) Jiaxing Yaoliang Import & Export Co., Ltd.
(33) Jinan Banghe Industry & Trade Co., Ltd.
(34) Macropower Industrial Inc.
(35) Midas Union Co., Ltd.
(36) Nanjing Prosper Import & Export Corporation Ltd.
(37) New Pole Power System Co., Ltd.
(38) Ningbiao Bolts & Nuts Manufacturing Co.
(39) Ningbo Beilun Milfast Metalworks Co., Ltd.
(40) Ningbo Beilun Pingxin Hardware Co., Ltd.
(41) Ningbo Dexin Fastener Co., Ltd.
(42) Ningbo Dongxin High-Strength Nut Co., Ltd.
(43) Ningbo Fastener Factory
(44) Ningbo Fengya Imp. and Exp. Co., Ltd.
(45) Ningbo Fourway Co., Ltd.
(46) Ningbo Haishu Holy Hardware Import and Export Co., Ltd.
(47) Ningbo Haishu Wit Import & Export Co., Ltd.
(48) Ningbo Haishu Yixie Import & Export Co., Ltd.
(49) Ningbo Jinding Fastening Pieces Co., Ltd.
(50) Ningbo MPF Manufacturing Co., Ltd.
(51) Ningbo Panxiang Imp. & Exp. Co., Ltd.
(52) Ningbo Yili Import & Export Co., Ltd.
(53) Ningbo Yinzhou Foreign Trade Co., Ltd.
(54) Ningbo Yinzhou Woafan Industry & Trade Co., Ltd.
(55) Ningbo Zhongjiang High Strength Bolts Co., Ltd.
(56) Ningbo Zhongjiang Petroleum Pipes & Machinery Co., Ltd.
(57) Orient International Holding Shanghai Rongheng Intl Trading Co., Ltd.
(58) Prosper Business and Industry Co., Ltd.
(59) Qingdao Free Trade Zone Health Intl.
(60) Qingdao Top Steel Industrial Co., Ltd.
(61) Shaanxi Succeed Trading Co., Ltd.
(62) Shanghai Autocraft Co., Ltd.
(63) Shanghai East Best Foreign Trade Co.
(64) Shanghai East Best International Business Development Co., Ltd.
(65) Shanghai Fortune International Co., Ltd.
(66) Shanghai Furen International Trading
(67) Shanghai Hunan Foreign Economic Co., Ltd.
(68) Shanghai Jiabao Trade Development Co., Ltd.
(69) Shanghai Nanshi Foreign Economic Co.
(70) Shanghai Overseas International Trading

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[15] *See* 19 CFR 351.212(b).

[16] *See* 19 CFR 351.212(b)(1).

[17] *See* 19 CFR 351.106(c)(2).

[18] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011).

Co., Ltd.
(71) Shanghai Prime Machinery Co., Ltd.
(72) Shanghai Printing & Dyeing And Knitting Mill
(73) Shanghai Printing & Packaging Machinery Corp.
(74) Shanghai Recky International Trading Co., Ltd.
(75) Shanghai Sinotex United Corp. Ltd.
(76) Suntec Industries Co., Ltd.
(77) Suzhou Henry International Trading Co., Ltd.
(78) T and C Fastener Co., Ltd.
(79) T and L Industry Co., Ltd.
(80) Wuxi Metec Metal Co., Ltd.
(81) Zhejiang Jin Zeen Fasteners Co., Ltd.
(82) Zhejiang Zhenglian Industry Development Co., Ltd.
(83) Zhoushan Zhengyuan Standard Parts Co., Ltd.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

1. Summary
2. Background
3. Verification
4. Scope of the Order
5. Respondent Selection
6. Non-Market Economy Country
7. Separate Rates
8. PRC-Wide Entity
9. Surrogate Country and Surrogate Value Data
10. Surrogate Country
11. Date of Sale
12. Comparisons to Normal Value
13. U.S. Price—Export Price
14. Normal Value
15. Factor Valuations
16. Currency Conversion
17. Conclusion

[FR Doc. 2016–11389 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE615

Marine Mammals; File No. 20324

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Living Planet Productions/Silverback Films, 1 St. Augustines Yard, Gaunts Lane, Bristol, BS1 5DE, United Kingdom, has applied in due form for a permit to conduct commercial or educational photography on bottlenose dolphins (*Tursiops truncatus*).

DATES: Written, telefaxed, or email comments must be received on or before June 13, 2016.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 20324 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. 20324 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Jennifer Skidmore or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to film and photograph the Florida Bay stock of bottlenose dolphins for purposes of a documentary film. The applicant is requesting up to 140 takes of these animals by Level B harassment via aircraft (helicopter) and up to 828 takes by Level B harassment from a small 20 ft. vessel. Filming would take place for approximately 30 filming days. Obtained footage will be part of a documentary film series and featured in the episode describing shallow seas. The permit is requested for a 2 year period.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: May 10, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–11348 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE599

Marine Mammals; File No. 19638

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Paul Ponganis, Ph.D., University of California at San Diego, La Jolla, CA 92093, has applied in due form for a permit to conduct research on California sea lions (*Zalophus californianus*).

DATES: Written, telefaxed, or email comments must be received on or before June 13, 2016.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 19638 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Sara Young or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The purpose of this research is to determine the role of blood oxygen store depletion in the dive behavior and foraging ecology of California sea lions. This research would help determine the ability of these animals to adapt to environmental change. Over the course of five years, up to 70 lactating females would be captured, flipper tagged, anesthetized, and equipped with a venous or arterial blood oxygen recorder, a velocity-acceleration-depth recorder, kinematic recorders, intravascular lactate sensor, or intravascular thermistor probe during foraging trips to sea. Animals would be recaptured after the foraging trip to remove the recorders. The pups of the females would also be captured and marked for ID purposes. Research would occur on San Nicolas Island off the coast of California. Annually, up to 4,000 California sea lions, 100 harbor seals (*Phoca vitulina*), 200 northern elephant seals (*Mirounga angustirostris*), and 30 northern fur seals (*Callorhinus ursinus*) may be incidentally harassed during research. A limited number of California sea lion mortalities (one per year) are requested. The permit would be valid for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: May 10, 2016.

Julia Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–11311 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE580

Marine Mammals; File No. 19116

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the NOAA Office of Science and Technology (Ned Cyr, Responsible Party), 1315 East-West Highway, Silver Spring, MD 20910, has applied in due form for a permit to conduct research on sixteen species of marine mammals in the Pacific Ocean.

DATES: Written, telefaxed, or email comments must be received on or before June 13, 2016.

ADDRESSES: The application is available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 19116 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Sara Young or Carrie Hubard, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The applicant requests a five-year permit to conduct a research program involving studies of sound production, diving and other behavior, and responses to sound of marine mammals, including endangered species. The results would be integrated with related studies and directly contribute to conservation management for sound producers and regulatory agencies by identifying characteristics of target species that are critical for passive monitoring, detection, and/or density estimation; and, by demonstrating how specific sounds, including simulated military sonar, may evoke behavioral responses in marine mammals. The experimental design involves temporarily attaching individual recording tags to measure vocalization, behavior, and physiological parameters as well as sound exposure. Behavior will be measured before, during, and after carefully controlled exposures of sound in conventional playback experiments. Tagged subjects will be exposed to received sound levels up to 180 dB re: 1µPa. This study will involve various activities that could take animals by harassment, including close approaches, attachment of tags, and sound exposure. Small fragments of sloughed skin, which often remain attached to retrieved tags, would be used for genetic analyses. Target species include beaked whales and other odontocetes, key baleen whales, and pinniped species for whom such data have not been previously obtained; other marine species may be incidentally impacted. Please refer to the tables in the application for the numbers of marine mammals, by species and stock, proposed for this permit. The research will be focused in the waters within the U.S. Navy's Southern California Range Complex, and primarily near the vicinity of San Clemente Island northward to Monterey Bay.

NMFS prepared a draft environmental assessment (EA) under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit and conduct of the research. The draft EA is available upon request for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal

Commission and its Committee of Scientific Advisors.

Dated: May 10, 2016.

Julia Harrison,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–11309 Filed 5–12–16; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products and a service previously furnished by such agencies.

DATES: *Comments must be received on or before:* 6/12/2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Services

Service Type: Facility Maintenance Service
Mandatory For: U.S. Coast Guard, Shore Facilities and Coast Guard Cutter Cheboygan, MI
Mandatory Source(s) of Supply: Grand Traverse Industries, Inc., Traverse City, MI
Contracting Activity: USCG, 1301 Clay Street, Suite 801N, Oakland, CA
Service Type: Engineering and Environmental Service
Mandatory for: U.S. Air Force, 61st Civil Engineer & Logistics Squadron, Los Angeles Air Force Base, 43 North Aviation Boulevard, El Segundo, CA
Mandatory Source(s) of Supply: PRIDE Industries, Roseville, CA
Contracting Activity: Dept of the Air Force, FA2816 SMC PKO, El Segundo, CA
Service Type: Custodial and Related Service
Mandatory for: GSA PBS Region 5, SSA Federal Building, 611 E. Genesee Avenue, Saginaw, MI
Mandatory Source(s) of Supply: SVRC Industries, Inc., Saginaw, MI
Contracting Activity: GSA, Public Buildings Service, Acquisition Management Division, Dearborn, MI

Deletions

The following products and service are proposed for deletion from the Procurement List:

Products

NSN(s)—Product Name(s): 3990–00–NSH–0065—Skid, Wood
Contracting Activity: Government Printing Office, Washington, DC
NSN(s)—Product Name(s):
6532–00–083–6534—Gown, Operating, Surgical
6532–00–083–6535—Gown, Operating, Surgical
6532–00–083–6536—Gown, Operating, Surgical
6532–00–104–9895—Gown, Hospital
Mandatory Source(s) of Supply: Unknown
Contracting Activity: Defense Logistics Agency Troop Support

Service

Service Type:
Toner Cartridge Remanufacturing
Malmstrom Air Force Base
Malmstrom AFB, MT
Mandatory Source(s) of Supply: Community Option Resource Enterprises, Inc., (COR Enterprises), Billings, MT
Contracting Activity: Dept of the Air Force, FA7014 AFDW PK

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2016–11330 Filed 5–12–16; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the procurement list.

SUMMARY: This action adds services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes products and services from the Procurement List previously furnished by such agencies.

DATES: Effective 6/12/2016.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 4/1/2016 (81 FR 18839–18840), the Committee for Purchase from People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities.

The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will provide the services to the Government.
2. The action will result in authorizing small entities to provide the services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type: Janitorial Service
Service Mandatory For: Library of Congress, Fort Meade Collection Storage Modules, Fort Meade, MD
Mandatory Source(s) of Supply: Goodwill Industries of the Chesapeake, Inc.,

Baltimore, MD
Contracting Activity: Library of Congress, Fedlink Contracts, Washington, DC
Service Type: Custodial Service
Service Mandatory For: National Park Service NE Region, Tri-Site Maintenance Facility, Olmsted, Kennedy & Longfellow/Washington National Historic Sites, Boston, MA
Mandatory Source(s) of Supply: Community Workshops, Inc., Boston, MA
Contracting Activity: Dept of the Interior, National Park Service, NER NE MABO, Boston, MA

Deletions

On 4/8/2016 (81 FR 20624–20625), the Committee for Purchase from People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List.

After consideration of the relevant matter presented, the Committee has determined that the products and services listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities.

The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services deleted from the Procurement List.

End of Certification

Accordingly, the following products and services are deleted from the Procurement List:

Products

NSN(s)—Product Name(s):
MR 10654—Bottle, Single Wall
MR 10656—Saver, Sandwich
MR 10666—Thermos, 25 oz., Licensed
MR 10667—Tumbler, Drinking, 16 oz., Licensed
MR 10669—Kit, Party, New Year's
Mandatory Source(s) of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: Defense Commissary Agency
NSN(s)—Product Name(s): 6545–01–533–7042—Quik Clot Module
Mandatory Source(s) of Supply: Chautauqua County Chapter, NYSARC, Jamestown, NY
Contracting Activity: Defense Logistics Agency Troop Support

Services

Service Type: Janitorial/Custodial Service
Mandatory for: Fairchild Air Force Base: Air Recovery and Rescue Squadron (Bldg. 2036), SAC/MET Office (Building 2001B), Fairchild AFB, WA
Mandatory Source(s) of Supply: Skils'kin, Spokane, WA
Contracting Activity: Dept of the Air Force, FA7014 AFDW PK, Andrews AFB, MD
Service Type: Operation of Postal Service Center Service
Mandatory for: Fairchild Air Force Base, Fairchild AFB, WA
Mandatory Source(s) of Supply: Skils'kin, Spokane, WA
Contracting Activity: Dept of the Air Force, FA4620 92 CONS LGC, Fairchild AFB, WA

Barry S. Lineback,
Director, Business Operations.

[FR Doc. 2016–11331 Filed 5–12–16; 8:45 am]

BILLING CODE 6353–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Friday, May 20, 2016.

PLACE: Three Lafayette Centre, 1155 21st Street NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance, enforcement, and examinations matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Natise Allen,
Executive Assistant.

[FR Doc. 2016–11548 Filed 5–11–16; 4:30 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Programmatic Environmental Impact Statement for Training Mission and Mission Support Activities at Fort Campbell, KY

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of the Final Programmatic Environmental Impact Statement (PEIS) for proposed training mission and mission support activities at Fort Campbell, KY. Pursuant to the National Environmental Policy Act of 1969 (NEPA), the Final PEIS analyzes the potential impacts of training and mission support activities on the environmental resources of Fort Campbell and the surrounding region. The Final PEIS assesses the No Action Alternative, four action alternatives, and a fifth alternative that would implement all of the separate action alternatives. The Proposed Action would meet the Senior Commander's Soldier training requirements, support the Range Complex Master Plan, and streamline the NEPA analysis process for routine range and training land actions occurring at Fort Campbell.

DATES: No decision will be made until at least 30 days after publication of the Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency, at which time the Army will document its selection of alternative(s) in a Record of Decision.

ADDRESSES: Please send written comments to Mr. Gene Zirkle, NEPA/Wildlife Program Manager, Environmental Division, Building 2159 13th Street, Fort Campbell, KY 42223; or by email to *gene.a.zirkle.civ@mail.mil.*

FOR FURTHER INFORMATION CONTACT: Please contact Mr. Gene Zirkle, NEPA/Wildlife Program Manager, Environmental Division, 270–798–9854, during normal working business hours Monday through Friday, 7:30 a.m. to 4:00 p.m. CST; or by email to *gene.a.zirkle.civ@mail.mil.*

SUPPLEMENTARY INFORMATION: The Final PEIS has been prepared to meet the requirements of NEPA to evaluate the environmental and socioeconomic impacts, as well as cumulative impacts, of implementing the proposed actions at Fort Campbell. The Final PEIS takes into consideration comments received on the Draft PEIS. No substantial changes were made to the Final PEIS based on comments received during the Draft EIS comment period. The Final information includes impacts to, and mitigation for the Northern Long Eared Bat, which was listed as threatened after the Draft EIS was released. The resource areas evaluated include air quality, airspace, biological resources, cultural resources, energy, facilities, land use, hazardous materials/waste, noise, socioeconomics, soils, traffic and transportation, water resources, and wetland resources. There would be no significant impacts; however, moderate adverse impacts could occur to soils, biological resources, and water resources.

Fort Campbell covers 105,068 acres in Kentucky and Tennessee. Fort Campbell is home to the 101st Airborne Division (Air Assault), the 5th Special Forces Group, 160th Special Operations Aviation Regiment, and other tenant units. The mission of Fort Campbell is primarily to support and train the units stationed on the installation in preparation for a variety of assigned combat and combat related missions.

The purpose of the Proposed Action is to provide the forces that train on Fort Campbell with state-of-the-art training facilities and ranges. The action would also implement site-specific range modernization needs contained within the Range Complex Master Plan. The Final PEIS will also support future decisions regarding routine range and training land actions occurring at Fort Campbell that are not covered under an existing NEPA analysis.

The Final PEIS analyzes the potential environmental impacts of the No Action Alternative—continuing existing training missions and environmental programs, and maintaining existing environmental conditions through current operational controls. The PEIS analyzes four alternatives and one alternative implementing all of these alternatives:

- Alternative 1—Construct and Operate Site-Specific Projects in Support of Soldier Training.
- Alternative 2—Create Adaptable Use Zones (AUZs) to Facilitate Future Modernization and Range Facility Construction.
- Alternative 3—Implement Routine Range and Training Land Actions and Environmental Stewardship Practices.
- Alternative 4—Evaluate the Reactivation of Installation Controlled Airspace.
- Alternative 5—Implement Action Alternatives 1–4.

The preferred alternative is Alternative 5.

The U.S. Army plans to issue a Record of Decision no earlier than 30 days after the date of the U.S. Environmental Protection Agency's Notice of Availability. The Final PEIS is available at *http://www.campbell.army.mil/Pages/TMMSA.aspx.*

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–11285 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[OMB Control Number 0704–0441; Docket Number DARS–2016–0019]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Quality Assurance

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed revision of an approved information collection requirement.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), DoD announces the proposed revision of a public information collection requirement and seeks public comment on the provisions thereof. *DoD invites comments on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through July 31, 2016. DoD proposes that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD will consider all comments received by July 12, 2016.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0441, using any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: osd.dfars@mail.mil. Include OMB Control Number 0704–0441 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Jo Ann Reilly, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B941, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Jo Ann Reilly, at 571–372–6098. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.* Paper copies are available from Ms. Jo Ann Reilly, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B941, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS), Part 246, Quality Assurance and Related Clauses in 252.246; OMB Control Number 0704–0441.

Needs and Uses: DoD needs to ensure that the Government receives timely notification of item nonconformances or deficiencies that could impact safety. The Procuring Contracting Officer and the Administrative Contracting Officer use the information to ensure that the customer is aware of potential safety issues in delivered products, has a basic understanding of the circumstances, and has a point of contact to begin addressing a mutually acceptable plan of action. In addition, DoD needs to track warranties for Item Unique Item Identification (IUID) required items in the IUID registry. The identification and enforcement of warranties is essential to the effectiveness and efficiency of DoD's material readiness.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Number of Respondents: 54,250.

Responses per Respondent: 1.

Annual Responses: 54,250.

Average Burden per Response: Approximately .5 hour.

Annual Burden Hours: 27,250.

Reporting Frequency: On occasion.

Summary of Information Collection

This information collection includes requirements relating to DFARS part 246, Quality Assurance. The information collections under OMB Control Number 0704–0441 are expanded to pertain to all information that offerors or contractors must submit related to DFARS part 246 contract quality assurance programs. Therefore, this justification supports a request for renewal of OMB Control Number 0704–0441 to include the incorporation of the burden currently cleared under OMB Control Number 0704–0481, which expires June 30, 2017. Upon the renewal of OMB Control Number 0704–0441, OMB Control Number 0704–0481 and its associated burden will be discontinued.

a. 252.246–7003, Notification of Potential Safety Issues, requires contractors to provide notification of (1) all nonconformances for parts identified as critical safety items acquired by the Government under the contract, and (2) all nonconformances or deficiencies that may result in a safety impact for systems, or subsystems, assemblies, subassemblies, or parts integral to a system acquired by or serviced for the Government under the contract.

b. 252.246–7005, Notice of Warranty Tracking of Serialized Items, requires an offeror to provide with its offer, for each contract line item number, warranty tracking information for each warranted item.

c. 252.246–7006, Warranty Tracking of Serialized Items, requires contractors, for warranted items, to provide (1) the unique item identifier, and (2) the warranty repair source information and instructions.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2016–11373 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[OMB Control Number 0704–0434; Docket Number DARS–2016–0018]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Radio Frequency Identification Advance Shipment Notices

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. *DoD invites comments on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through August 31, 2013. DoD proposes that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD will consider all comments received by July 12, 2016.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0434, using any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Email: osd.dfars@mail.mil. Include OMB Control Number 0704–0434 in the subject line of the message.

Fax: 571–372–6094.

Mail: Defense Acquisition Regulations System, Attn: Ms. Dustin Pitsch, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B941, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, 571–372–6090. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.* Paper copies are available from Mr. Dustin Pitsch, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION:

Title, Associated Form, and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS); Radio Frequency Identification Advance Shipment Notices; OMB Control Number 0704–0434.

Needs and Uses: DoD uses advance shipment notices for the shipment of material containing Radio Frequency Identification (RFID) tag data. DoD receiving personnel use the advance shipment notice to associate the unique identification encoded on the RFID tag with the corresponding shipment. Use of the RFID technology permits DoD an automated and sophisticated end-to-end supply chain that has increased visibility of assets and permits delivery of supplies to the warfighter more quickly.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Number of Respondents: 5,217.

Responses per Respondent: 3,782.

Annual Responses: 19,732,850.

Average Burden per Response: Approximately 1.16 seconds.

Annual Burden Hours: 6,353.

Frequency: On Occasion.

Summary of Information Collection

The clause at DFARS 252.211–7006, Passive Radio Frequency Identification, requires the contractor to ensure that the data on each passive RFID tag are unique and conform to the requirements that they are readable and affixed to the appropriate location on the specific level of packaging in accordance with MIL–STD–129 tag placement specifications. The contractor shall encode an approved RFID tag using the appropriate instructions at the time of contract award. Regardless of the selected encoding scheme, the contractor is responsible for ensuring that each tag contains a globally unique identifier. The contractor shall electronically submit advance shipment notices with the RFID tag identification in advance of the shipment in accordance with the procedures at *https://wawf.eb.mil/.*

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2016–11374 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0057]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the

burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by July 12, 2016.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Assistant Secretary of Defense for Readiness, Force Education and Training, Voluntary Education, ATTN: Ms. Dawn Bilodeau, Pentagon, Room 2E573, Washington, DC 20301–1500 or send email to project officer at: *dawn.a.bilodeau.civ@mail.mil.*

SUPPLEMENTARY INFORMATION: President Barack Obama signed Executive Order 13607 on April 27, 2012 to address the problem of aggressive and deceptive targeting of Service members, veterans, and their families by some educational institutions. Section 4 of the Executive Order specifically calls for the creation of a robust, centralized complaint process for students receiving Federal military and veterans' educational benefits.

DoD, along with the participating Federal agencies identified in the Executive Order have determined that this complaint process, in addition to taking in complaints about abusive or deceptive practices by schools, must create an opportunity for schools to resolve those complaints, and must ensure that complaint data is accessible both to the relevant components at the Departments of Defense, Veterans Affairs, and Education that review schools for compliance and program eligibility, as well as the relevant law enforcement agencies that will prosecute any illegal practices. Beyond creation of this complaint process, the agencies seek to prevent abusive, deceptive, and fraudulent marketing practices through the following mechanisms: establishment of risk-based program reviews; limits on access to military installations by educational institutions; and the use of intellectual property and other legal protections to ensure Web sites and programs are not deceptively suggesting military affiliation or endorsement. The centralized complaint system will provide a resource for students receiving military and veteran educational benefits to effectively submit complaints against institutions they feel have acted deceptively or fraudulently. The first step is to make it easier for prospective and current military students and spouse-students to raise these concerns.

Title; Associated Form; and OMB Number: DoD Postsecondary Education Complaint Intake Form, DD Form 2961; OMB Control Number 0704–0501.

Needs and Uses: The information collection requirement is necessary to obtain, document, and respond to egregious complaints, questions, and other information concerning actions post-secondary education programs and services provided to military service members and spouse-students. The DoD Postsecondary Education Complaint Intake form will provide pertinent information such as: the content of the complaint, the educational institution the student is attending, the level of study, the education program the student is enrolled in, the type of education benefits being used, the branch of the military service, and the preferred contact information.

Affected Public: Individuals or households.

Annual Burden Hours: 25.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 15 minutes.

Frequency: On Occasion.

Respondents are military spouses who submit complaints via the Department of Defense (DoD) Postsecondary Education Complaint Intake form. The PECS Intake form is used to record complaints concerning educational institutions that military spouses feel have acted deceptively, aggressively or fraudulently towards them. The Intake form documents information such as the level of study of the student, the educational institution the student is attending, the type of education benefits being used, the branch of the military service the spouses' sponsor, the content of the complaint, and the preferred contact information for the person making the contact. Complaint Case Managers use information from the Intake form to track and manage cases and to coordinate a resolution with educational institutions, and to provide feedback to the respondent throughout the process and once a resolution has been reached.

Dated: May 9, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–11290 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Charter Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that it is renewing the charter for the U.S. Air Force Scientific Advisory Board ("the Board").

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: This committee's charter is being renewed in accordance with the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 CFR 102–3.50(d). The charter and contact information for the Board's Designated Federal Officer (DFO) can be obtained at *http://www.facadatabase.gov/.*

The Board provides the Secretary of Defense and the Deputy Secretary of Defense, through the Secretary of the Air Force, independent advice and recommendations on matters relating to the Department of the Air Force's scientific, technical, manufacturing, acquisition, logistics, and business management functions, as well as other Department of the Air Force related matters. The Board shall be composed of no more than 20 members, all of whom are distinguished members of the science and technology communities, Federally Funded Research and Development Centers, National Laboratories, industry, and academia (universities and colleges). Members who are not full-time or permanent part-time Federal officers or employees are appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee members. Members who are full-time or permanent part-time Federal officers or employees are appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee members. All members are appointed to provide advice on behalf of the Government on the basis of their best judgment without representing any particular point of view and in a manner that is free from conflict of interest. Except for reimbursement of official Board-related travel and per diem, members serve without compensation. The DoD, as necessary and consistent with the Board's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Board, and all subcommittees must operate under the provisions of FACA and the Government in the Sunshine Act. Subcommittees will not work independently of the Board and must report all recommendations and advice solely to the Board for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Board. No subcommittee or any of its members can update or report, verbally or in writing, directly to the DoD or any Federal officers or employees. The Board's DFO, pursuant to DoD policy, must be a full-time or permanent part-time DoD employee, and must be in attendance for the duration of each and every Board/subcommittee meeting. The public or interested organizations may submit written statements to the Board membership about the Board's mission and functions. Such statements may be submitted at any time or in response to the stated agenda of planned Board. All written statements must be submitted to the Board's DFO who will ensure the written statements are provided to the membership for their consideration.

Dated: May 10, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–11308 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Health Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Health Board will take place.

DATES:

Thursday, June 2, 2016

9:00 a.m.–10:15 a.m. (Closed Session)
10:15 a.m.–11:45 a.m. (Open Session)
11:45 a.m.–12:45 p.m. (Administrative Session)
12:45 p.m.–5:00 p.m. (Open Session)

ADDRESSES: Defense Health Headquarters (DHHQ), Pavilion Salons B–C, 7700 Arlington Blvd., Falls Church, Virginia 22042 (escort required; see guidance in **SUPPLEMENTARY INFORMATION**, "Public's Accessibility to the Meeting").

FOR FURTHER INFORMATION CONTACT: The Executive Director of the Defense Health Board is Ms. Christine Bader, 7700 Arlington Boulevard, Suite 5101, Falls Church, Virginia 22042, (703) 681–6653, Fax: (703) 681–9539, *christine.e.bader.civ@mail.mil.* For meeting information, please contact Ms. Kendal Brown, 7700 Arlington Boulevard, Suite 5101, Falls Church, Virginia 22042, *kendal.l.brown2.ctr@mail.mil,* (703) 681–6670, Fax: (703) 681–9539.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Additional information, including the agenda and electronic registration, is available at the DHB Web site, *http://www.health.mil/About-MHS/Other-MHS-Organizations/Defense-Health-Board/Meetings.*

Purpose of the Meeting

The purpose of the meeting is to provide progress updates on specific taskings before the DHB. In addition, the DHB will receive information briefings on current issues or lessons learned related to military medicine, health policy, health research, disease/injury prevention, health promotion, and healthcare delivery.

Agenda

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.155, in the interest of national security, the DoD has determined that the first presentation in the morning of June 2, 2016 will be closed to the public. The topic is a presentation on the mission and functions of the National Center for Medical Intelligence. The Assistant Secretary of Defense (Health Affairs), in consultation with the Office of the DoD General Counsel, has determined in writing that the public interest requires that the first presentation in the morning session on June 2, 2016 be closed to the public because it will concern matters listed in section 552b(c)(1) of title 5, United States Code. The classified materials are so inextricably intertwined with the unclassified material that they cannot be reasonably segregated into separate discussions without disclosing SECRET material. Specifically, the information presented meets criteria established by an Executive Order to be kept secret in the interest of national defense and foreign policy.

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165 and subject to availability of space, the DHB meeting is open to the public from 10:15 a.m. to 11:45 a.m. on June 2, 2016, and from 12:45 p.m. to 5:00 p.m. The DHB will receive a progress update from the Health Care Delivery Subcommittee on the pediatric clinical preventive services review and an update from the Public Health Subcommittee on their review of improving Defense Health Program medical research processes. In addition, the DHB anticipates receiving information briefings on Defense Advanced Research Projects Agency medical research, the Army Study to Assess Risk and Resilience in Servicemembers (STARRS), the Infectious Disease Clinical Research Program, and Advances in the Use of Whole Blood for Combat Trauma Resuscitation. Any changes to the agenda can be found at the link provided in this **SUPPLEMENTARY INFORMATION** section.

Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b, and 41 CFR 102–3.140 through 102–3.165 and subject to availability of space, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Ms. Kendal Brown at the number listed in the section **FOR FURTHER INFORMATION CONTACT** no later than 12:00 p.m. on Wednesday, May 25, 2016 to register. Additional details will be provided to all registrants.

Special Accommodations

Individuals requiring special accommodations to access the public meeting should contact Ms. Kendal Brown at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Statements

Any member of the public wishing to provide comments to the DHB may do so in accordance with section 10(a)(3) of the Federal Advisory Committee Act, 41 CFR 102–3.105(j) and 102–3.140, and the procedures described in this notice.

Individuals desiring to provide comments to the DHB may do so by submitting a written statement to the DHB Designated Federal Officer (DFO) (see **FOR FURTHER INFORMATION CONTACT**). Written statements should not be longer than two type-written pages and address the following details: The issue, discussion, and a recommended course of action. Supporting documentation may also be included, as needed, to establish the appropriate historical context and to provide any necessary background information.

If the written statement is not received at least five (5) business days prior to the meeting, the DFO may choose to postpone consideration of the statement until the next open meeting.

The DFO will review all timely submissions with the DHB President and ensure they are provided to members of the DHB before the meeting that is subject to this notice. After reviewing the written comments, the President and the DFO may choose to invite the submitter to orally present their issue during an open portion of this meeting or at a future meeting. The DFO, in consultation with the DHB President, may allot time for members of the public to present their issues for review and discussion by the Defense Health Board.

Dated: May 10, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–11342 Filed 5–12–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0025]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Formula Grant EASIE (Electronic Application System for Indian Education)

AGENCY: Department of Education (ED), Office of Elementary and Secondary Education (OESE).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 13, 2016.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0025. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–115 Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kimberly Smith, 202–453–6469.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Formula Grant EASIE (Electronic Application System for Indian Education).

OMB Control Number: 1810–0021.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 11,300.

Total Estimated Number of Annual Burden Hours: 9,103.

Abstract: The Indian Education Formula Grant (CFDA 84.060A) requires the annual submission of the application from the local educational agency and/or tribe. The amount of each applicant's award is determined by formula, based upon the reported number of American Indian/Alaska Native students identified in the application, the state per pupil expenditure, and the total appropriation available. Applicants provide the data required for funding electronically, and the Office of Indian Education (OIE) is able to apply electronic tools to facilitate the review and analysis leading to grant awards. The system has been named Formula Grant Electronic Application System for Indian Education (EASIE), and is located in the EDFacts System (ESS) Web site.

Dated: May 10, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–11303 Filed 5–12–16; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–9946–05]

Access to Confidential Business Information by Abt Associates, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Abt Associates of Bethesda, MD, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data occurred on April 27, 2016.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Scott Sherlock, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8257; email address: *Sherlock.scott@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2003–0004, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

Under EPA contract number EP–W–16–009, contractor Abt Associates of 4800 Montgomery Lane, Bethesda, MD and 55 Wheeler Street, Cambridge, MA is assisting the Office of Pollution Prevention and Toxics (OPPT) in the development of economic assessments; surveys; and non-regulatory activities that will require access to data and other confidential business information. The contractor is also assisting in evaluating the potential risks of new chemical substances including microorganisms and evaluating existing chemicals for risk and for the need to develop data bearing on such risks.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number EP–W–16–009, Abt Associates required access to CBI submitted to EPA under all section(s) of TSCA to perform successfully the duties specified under the contract. Abt Associates personnel were given access to information submitted to EPA under all section(s) of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA has provided Abt Associates access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract is taking place at EPA Headquarters and Abt Associates' sites located in Bethesda, MD and Cambridge, MA, in accordance with EPA's *TSCA CBI Protection Manual.*

Access to TSCA data, including CBI, will continue until March 30, 2021. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

Abt Associates personnel have signed nondisclosure agreements and were briefed on appropriate security procedures before they were permitted access to TSCA CBI.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: May 4, 2016.

Megan J. Carroll,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–11379 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9026–9]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www2.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EISs) filed 05/02/2016 through 05/06/2016 pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20160098, Final, USFWS, AZ, Pima County Multi-species Conservation Plan, review period ends: 06/13/2016, Contact: Michelle Shaughnessy 505–248–6654.

EIS No. 20160099, Final, USFS, OR, Granite Creek Watershed Mining Project, review period ends: 06/13/2016, Contact: Sophia Millar 541–263–1735.

EIS No. 20160100, Final, FTA, MN, Southwest Light Rail Transit, review period ends: 06/13/2016, Contact: Maya Sarna 202–366–5811.

EIS No. 20160101, Draft, USFS, CA, Littlerock Reservoir Sediment Removal Project, comment period ends: 06/30/2016, Contact: Lorraine Gerchas 626–574–5281.

EIS No. 20160102, Draft, FERC, PA, Atlantic Sunrise Project, comment period ends: 06/27/2016, Contact: Joanne Wachholder 202–502–8056.

EIS No. 20160103, Final, USA, KY, PROGRAMMATIC—U.S. Army Garrison Fort Campbell, Training Mission and Mission Support Activities, review period ends: 06/13/2016, Contact: Trudy Carr 270–798–2877.

EIS No. 20160104, Final, BLM, WY, Energy Gateway South Transmission Project, review period ends: 06/13/2016, Contact: Tamara Gertsch 307–775–6115. Final Supplement, NRC, NV, Supplement to the U.S. Department of Energy's Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada—Final Report, NUREG–2184, Contact: Christine Pineda 301–415–6789. Prepared in accordance with NWPA

§ 114 and 10 CFR 51.109, which describes the NRC's NEPA process for its review of the proposed geologic repository at Yucca Mountain, Nevada.

Amended Notices

EIS No. 20150333, Draft, NMFS, USFWS, CA, Butte Regional Conservation Plan, comment period ends: 06/08/2016, Contact: Dan Cox 916–414–6593.

Revision to FR Notice Published 02/19/2016; U.S. Fish and Wildlife Service and the U.S. National Marine Fisheries Service jointly are reopening the comment period to end 06/08/2016.

Dated: May 10, 2016.

Karin Leff,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2016–11347 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2015–0613; FRL–9946–06–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Title I of the Marine Protection, Research, and Sanctuaries Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Title I of the Marine Protection, Research, and Sanctuaries Act" (EPA ICR No. 0824.06, OMB Control No. 2040–0008) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed reinstatement of the ICR (formerly known as "Ocean Dumping Regulations—reports and record keeping to obtain a permit, request designation, and report on permitted dumping activities"), which is currently expired. Public comments were previously requested via the **Federal Register** (81 FR 484) on January 6, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before June 13, 2016.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2015–0613, online using *www.regulations.gov* (our preferred method), by email to *ow-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: David Redford, Oceans and Coastal Protection Division, Environmental Protection Agency, 4504T 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone 202–566–1288; email address: *redford.david@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *www.epa.gov/dockets.*

Abstract: Ocean dumping—the transportation of any material for the purpose of dumping in ocean waters—cannot occur unless a permit is issued under the Marine Protection, Research, and Sanctuaries Act (MPRSA). EPA is responsible for issuing ocean dumping permits for all materials except dredged material. EPA collects or sponsors the collection of information for the purposes of permit issuance, reporting of emergency dumping to safety of life at sea, compliance with permit requirements, including specifically general permits for burial at sea and for transportation and disposal of vessels.

Form numbers: None.

Respondents/affected entities: Respondents/affected entities may include any private person or entity, or State, local or foreign governments.

Respondent's obligation to respond: Required to obtain or retain a benefit, specifically permit authorization and/or compliance with permits required under MPRSA sections 102 and 104, 33 U.S.C. 1402 & 1404, and implementing regulations at 40 CFR parts 220–229.

Estimated number of respondents: 2,767 respondents per year.

Frequency of response: The frequency of response varies for application and reporting requirements for different permits. Other than the general permit for transportation and disposal of vessels, response is required once for each permit application, whether a single notification to EPA or a permit application. Depending on the type of MPRSA permit, a permit application would be required prior to expiration if the permittee seeks re-issuance: general permit (once every seven years); special permit (once every three years), and research permit (once every 18 months).

Total estimated burden: 3,207 hours per year. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $349,157, which includes $195,857 for capital or operation & maintenance costs.

Changes in Estimates: EPA estimates an increase in the number of respondents from 21 to 2,767 with a corresponding decrease in total estimated burden from 27,004 to 3,207 hours as compared to the most recently approved ICR, which expired January 31, 1992. The estimated increase in the number of respondents is due to the significant increase in the number of entities using the burial at sea and vessel general permits, which were not widely used at the time of the earlier ICR. The estimated decrease in the total estimated burden is due to the implementation of the Ocean Dumping Ban Act of 1988, which led to the cessation of the dumping of sewage sludge and industrial wastes. The respondent burden for these special permits was high due the potentially significant impacts from dumping these wastes, and the data required from the respondents to ensure permit compliance.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2016–11275 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–SFUND–2012–0104; FRL–9945–81–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Brownfields Program—Accomplishment Reporting (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Brownfields Program—Accomplishment Reporting (Renewal)" (EPA ICR No. 2104.06, OMB Control No. 2050–0192) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through May 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 10859) on March 2, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before June 13, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–SFUND–2012–0104, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *docket.superfund@epa.gov*, or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov*. Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Kelly Gorini, Office of Brownfields and Land Revitalization, (5105T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202)–566–1702; fax number: (202)–566–1476; email address: *gorini.kelly@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Abstract: The Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107–118) ("the Brownfields Amendments") was signed into law on January 11, 2002. The Act amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, and authorizes EPA to award cooperative agreements to states, tribes, local governments, and other eligible entities to assess and clean up brownfield sites. Under CERCLA 101(39), a brownfields site means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. For funding purposes, EPA uses the term "brownfields property(ies)" synonymously with the term "brownfields sites." CERCLA 104(k) authorizes EPA to award several types of cooperative agreements to eligible entities on a competitive basis.

Under CERCLA 104(k), states, tribes, local governments, and other eligible entities may receive assessment cooperative agreements to inventory, characterize, assess, and conduct planning and community involvement related to brownfields properties; cleanup cooperative agreements to carry out cleanup activities at brownfields properties; cooperative agreements to capitalize revolving loan funds and provide subawards for cleanup activities; area-wide planning cooperative agreements to develop revitalization plans for brownfields; and environmental workforce and development job training and placement programs. Under CERCLA 128(a), states and tribes may receive cooperative agreements to establish and enhance their response programs.

Cooperative agreement recipients ("recipients") have general reporting and record keeping requirements as a condition of their cooperative agreement that result in burden. A portion of this reporting and record keeping burden is authorized under 2 CFR 200.328, 200.333 and 200.335 and identified in the EPA's general grants ICR (OMB Control Number 2030–0020). However, EPA also requires Brownfields program recipients to maintain and report additional information to EPA on the uses and accomplishments associated with funded brownfields activities. EPA uses several forms to assist recipients in reporting the information and to ensure consistency of the information collected. EPA uses this information to meet Federal stewardship responsibilities to manage and track how program funds are being spent, to evaluate the performance of the Brownfields Cleanup and Land Revitalization Program, to meet the Agency's reporting requirements under the Government Performance Results Act, and to report to Congress and other program stakeholders on the status and accomplishments of the program.

Form Numbers: 6200–14, 6200–13, 6200–04, 6200–03.

Respondents/affected entities: State/local/tribal governments; Non-Profits.

Respondent's obligation to respond: Required to obtain or Retain Benefits (2 CFR part 1500).

Estimated number of respondents: 2,890 (total).

Frequency of response: Bi-annual; quarterly, on occasion.

Total estimated burden: 3,877 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $414,197 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 710 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to the overall increase in wages and the overall increase in the number of respondents submitting the Property Profile Forms. Even with this slight increase, respondents indicated that improvements in the ACRES reporting system and increased familiarity with the program led to a lower burden per individual entry.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2016–11277 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2016–0071; FRL–9945–35–OEI]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Solid Waste Disposal Facility Criteria (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), "Solid Waste Disposal Facility Criteria (Renewal)" (EPA ICR No. 1381.11, OMB Control No. 2050–0122) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This is a proposed extension of the ICR, which is currently approved through May 31, 2016. Public comments were previously requested via the **Federal Register** (81 FR 8956) on February 23, 2016 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before June 13, 2016.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–RCRA–2016–0071, to (1) EPA online using *www.regulations.gov* (our preferred method), by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460, and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Craig Dufficy, Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, Mail Code 5304P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 703–308–9037; fax number: 703–308–0514; email address: *dufficy.craig@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: In order to effectively implement and enforce final changes to 40 CFR part 258 on a State level, owners/operators of municipal solid waste landfills have to comply with the final reporting and recordkeeping requirements. Respondents include owners or operators of new municipal solid waste landfills (MSWLFs), existing MSWLFs, and lateral expansions of existing MSWLFs. The respondents, in complying with 40 CFR part 258, are required to record information in the facility operating record, pursuant to § 258.29, as it becomes available. The operating record must be supplied to the State as requested until the end of the post-closure care period of the MSWLF. The information collected will be used by the State Director to confirm owner or operator compliance with the regulations under part 258. These owners or operators could include Federal, State, and local governments, and private waste management companies.

Form Numbers: None.

Respondents/affected entities: Owners or operators of MSWLFs; State, Local, and Tribal governments.

Respondent's obligation to respond: Mandatory, see 40 CFR part 258.29.

Estimated number of respondents: 1,950 (total).

Frequency of response: On occasion.

Total estimated burden: 204,868 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: $15,255,544 (per year), includes $2,210,853 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 60 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to the increased number of states adopting the Research, Development, and Demonstration section (§ 258.4) since the last renewal.

Courtney Kerwin,

Acting Director, Collection Strategies Division.

[FR Doc. 2016–11276 Filed 5–12–16; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2016–3021]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 10–06 Application for Approved Finance Provider.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

Financial institutions interested in becoming an Approved Finance Provider (AFP) with EXIM Bank must complete this application in order to obtain approval to make loans under EXIM Bank insurance policies and/or enter into one or more Master Guarantee Agreements (MGA) with EXIM Bank. An AFP may participate in the Medium-Term Insurance, Bank Letter of Credit, and Financial Institution Buyer Credit programs as an insured lender, while AFPs approved for an MGA may apply for multiple loan or lease transactions to be guaranteed by EXIM Bank.

EXIM Bank uses the information provided in the form and the supplemental information required to be submitted with the form to determine whether the lender qualifies to participate in its lender insurance and guarantee programs. The details are necessary to evaluate whether the lender has the capital to fund potential transactions, proper due diligence procedures, and the monitoring capacity to carry out transactions.

The information collection tool can be reviewed at: *http://exim.gov/sites/default/files/pub/pending/eib10_06.pdf.*

DATES: Comments must be received on or before June 13, 2016 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on

WWW.REGULATIONS.GOV or by mail to Office of Information and Regulatory Affairs, 725 17th Street NW., Washington, DC 20038 Attn: OMB 3048–0032.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 10–06 Application for Approved Finance Provider.

OMB Number: 3048–0032.

Type of Review: Regular.

Need and Use: The information collected will allow EXIM Bank to determine compliance and content for transaction requests submitted to the Export-Import Bank under its insurance, guarantee, and direct loan programs.

Affected Public

This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 50.

Estimated Time per Respondent: 30 minutes.

Annual Burden Hours: 25 hours.

Frequency of Reporting of Use: As required.

Government Expenses

Reviewing time per year: 25 hours.

Average Wages per Hour: $42.50.

*Average Cost per Year (time*wages):* $1,062.50.

Benefits and Overhead: 20%.

Total Government Cost: $1,275.

Bonita Jones-McNeil,

Program Analyst, Agency Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2016–11340 Filed 5–12–16; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1184]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before July 12, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1184.

Title: Sections 1.946(d), 27.10(d), 27.12, 27.14 and 27.17, Service Rules for the Advanced Wireless Services H Block—Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915–1920 MHz and 1995–2000 MHz Bands—R&O, FCC 13–88.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, and not-for-profit institutions.

Number of Respondents: 1 respondent; 176 responses.

Estimated Time per Response: .5 hours.

Frequency of Response: Fourth and tenth year from the year the respondent obtained each license and on occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for these collections are contained in 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309, 310, 1404, and 1451.

Total Annual Burden: 88 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget for a three-year extension of OMB Control Number 3060–1184. Part 27 rule sections require respondents to report or disclose information to the Commission or third parties, respectively, and to maintain records. These requirements are necessary for the Commission staff to carry out its duties to determine technical, legal and other qualifications of applicants to operate and remain licensed to operate a station(s) for Personal Communications Services (PCS). In addition, the information is used to determine whether the public interest, convenience, and necessity are being served as required by 47 U.S.C. 309 and to ensure that applicants and licenses comply with ownership and transfer restrictions imposed by 47 U.S.C. 310. Without this information, the Commission would not be able to carry out its statutory responsibilities. The Commission is submitting this rulemaking for the Advanced Wireless Services (AWS) H Block to make available ten megahertz of spectrum for flexile use, extending the current PCS band. The rule allows the implementation of the Congressional directive in the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) to grant licenses for the 1915–1920 MHz (Lower H Block) and 1995–2000 MHz (Upper H Block) bands. The mandatory requirements will continue with this PRA collection, and there is no change in the third party disclosure requirements.

Federal Communications Commission.

Gloria J. Miles,

Federal Register Liaison Officer. Office of the Secretary.

[FR Doc. 2016–11335 Filed 5–12–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10002, Miami Valley Bank, Lakeview, OH

Notice is hereby given that the Federal Deposit Insurance Corporation ("FDIC") as Receiver for Miami Valley Bank, Lakeview, Ohio ("the Receiver") intends to terminate its receivership for said institution. The FDIC was appointed receiver of Miami Valley Bank on October 4, 2007. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.1, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: May 10, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–11355 Filed 5–12–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: May 9, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10520	First CornerStone Bank	King of Prussia	PA	5/6/2016

[FR Doc. 2016–11357 Filed 5–12–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10261, Turnberry Bank, Aventura, Florida

Notice is hereby given that the Federal Deposit Insurance Corporation ("FDIC") as Receiver for Turnberry Bank, Aventura, Florida ("the Receiver") intends to terminate its receivership for said institution. The FDIC was appointed receiver of Turnberry Bank on July, 16, 2010. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 32.1, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: May 3, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–11324 Filed 5–12–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Termination, 10292 The Peoples Bank, Winder, Georgia

The Federal Deposit Insurance Corporation (FDIC), as Receiver for 10292 The Peoples Bank, Winder, Georgia (Receiver) has been authorized to take all actions necessary to terminate the receivership estate of The Peoples Bank (Receivership Estate); the Receiver has made all dividend distributions required by law.

The Receiver has further irrevocably authorized and appointed FDIC-Corporate as its attorney-in-fact to execute and file any and all documents that may be required to be executed by the Receiver which FDIC-Corporate, in its sole discretion, deems necessary; including but not limited to releases, discharges, satisfactions, endorsements, assignments and deeds.

Effective May 1, 2016, the Receivership Estate has been terminated, the Receiver discharged, and the Receivership Estate has ceased to exist as a legal entity.

Dated: May 10, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–11356 Filed 5–12–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

[Notice 2016–02]

Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission

AGENCY: Federal Election Commission.

ACTION: Policy statement.

SUMMARY: The Federal Election Commission ("Commission") adopted a program on August 1, 2011, providing for a means by which persons and entities may have a legal question considered by the Commission earlier in both the report review process and the audit process. On October 23, 2013, the Commission revised this policy to provide an alternative electronic means to file a request with the Commission. This new policy is identical to the October 23, 2013 program, except that it makes two modifications: (1) To clarify that requests for consideration be submitted to the Commission Secretary to ensure that such request are processed in timely manner, and (2) to build five business days into the program to allow time for informal resolution of matters.

DATES: Effective May 13, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Lorenzo Holloway, Assistant General Counsel, or Margaret Forman, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: On August 1, 2011, the Commission adopted a program providing for a means by which persons and entities may have a legal question considered by the Commission earlier in both the report review process and the audit process. Specifically, when the Office of Compliance ("OC") (which includes the Reports Analysis Division and the Audit Division) requests that a person or entity take corrective action during the report review or audit process, if the person or entity disagrees with the request based upon a material dispute on a question of law, the person or entity may seek Commission consideration of the issue pursuant to this procedure. This Commission is now revising this program. The October 23, 2013 revision of the program was identical to that August 1, 2011 program, except that it provided alternative means to file a request with the Commission. This change was made to address and clarify timeliness issues due to delays in the processing and receipt of requests mailed to the Commission, by encouraging requests to be filed electronically by email. Processing delays can result in an untimely submission of a request under the program. Persons and entities making such a request may not be aware that these processing delays can occur when documents are sent via first class mail to a federal government agency. As currently revised, the program is identical to the October 23, 2013 program, except that it makes two modifications: (1) To clarify that requests for consideration be submitted to the Commission Secretary to ensure that such request are processed in timely manner, and (2) to build five business days into the program to allow time for informal resolution of matters. The first change was made to address and clarify that these requests must be sent to the attention of the Commission Secretary, either through the dedicated email address, *LegalRequestProgram@fec.gov*, or by mail to the Commission's mailing address. There are two reasons for this change. First, the Commission Secretary is the person responsible for transmitting the Request to each Commissioner, the General Counsel, and the Staff Director, and therefore must be the recipient of any requests. Second, if the request is sent to another staff member, by email or otherwise, the processing of the request could be delayed. The second change was made to build five business days into the program to allow time for informal resolution of matters. This informal resolution process will be especially helpful in situations where the information related to or generated in the request reveals information that could potentially result in the informal resolution of the matter, without using additional Commission resources to submit the request formally through the entire Program. Allowing five business days to attempt to informally resolve matters will provide OGC and OC with an amount of time dedicated exclusively to informal resolution efforts instead of dividing their time and resources between attempting informal resolution and preparing the recommendation memorandum in a compressed time period intended solely for drafting the recommendation to the Commission. This informal resolution process would allow for a more efficient use of Commission resources. The policy statement regarding this program is reprinted in its entirety, below. It includes the revisions outlined above, which appear in the third and fourth paragraphs of the "Procedures" section, below.

I. Procedures

Within 15 business days of a determination by the Reports Analysis Division or Audit Division that a person or entity remains obligated to take corrective action to resolve an issue that has arisen during the report review or audit process, the person or entity may seek Commission consideration if a material dispute on a question of law exists with respect to the recommended corrective action.[1] A "determination" for purposes of triggering the 15 business days is either: (1) Notification to the person or entity of legal guidance prepared by the Office of General Counsel ("OGC") at the request of the Reports Analysis Division recommending the corrective action; or (2) the end of the Committee's Audit Exit Conference response period.

Any request for consideration by a Committee during the report review process or the audit process shall be limited to questions of law on material issues, when: (1) The legal issue is novel, complex, or pertains to an unsettled question of law; (2) there has been intervening legislation, rulemaking, or litigation since the Commission last considered the issue; or (3) the request to take corrective action is contrary to or otherwise inconsistent with prior Commission matters dealing with the same issue. The request must specify the question of law at issue and why it is subject to Commission consideration. It should discuss, when appropriate, prior Commission matters raising the same issue, relevant court decisions, and any other analysis of the issue that may assist the Commission in its decision making. The Commission will not consider factual disputes under this procedure, and any requests for consideration other than on questions of law on material issues will not be granted.

All requests, including any extension requests, must be received by the Commission within 15 business days of the determination of corrective action. All requests must be directed to the attention of the Commission Secretary. Requestors may submit requests electronically via email. If a Requestor chooses to submit a request electronically via email, the email must be sent to *LegalRequestProgram@fec.gov.* Requestors are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, requests may be submitted in paper form. Paper requests must be sent to the Federal Election Commission, Attn.: Commission

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[1] Many disputes involving corrective action requests hinge on questions of fact rather than questions of law, and thus are not appropriate for this procedure.

Secretary, 999 E Street NW., Washington, DC 20463. Requestors are advised that if they submit a request, electronically or otherwise, to a different address than designated in this Policy, the processing of the request may be delayed. Upon receipt of a request, the Commission Secretary shall forward a copy of any request to each Commissioner, the General Counsel, and the Staff Director.

Any request for an extension of time to file will be considered on a case-by-case basis and will only be granted if good cause is shown, and the Commission approves the extension request by four affirmative votes within five business days of receipt of the extension request. Within five business days of notification to the Commissioners of a request for consideration of a legal question, if two or more Commissioners agree that the Commission should consider the request, OGC may, at that time, attempt to resolve the matter informally over the course of five business days. Within 15 business days from the date upon which OC and OGC conclude that the matter cannot be resolved informally, or from the expiration of the five business day period, whichever occurs first, OGC will prepare and circulate a recommendation in accordance with all applicable Commission Directives. If the matter is resolved informally, OC and OGC will notify the Commission that the matter has been resolved, and notify the Requestor in writing of the notification to the Commission. Informal resolution of a matter does not prevent the Requestor from seeking Commission consideration, in an additional or subsequent determination, subject to the requirements of this program.

After the recommendation is circulated for a Commission vote, in the event of an objection, the matter shall be automatically placed on the next meeting agenda consistent with the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11 CFR part 2. However, if within 60 business days of the filing of a request for consideration, the Commission has not resolved the issue or provided guidance on how to proceed with the matter by the affirmative vote of four or more Commissioners, the OC may proceed with the matter. After the 60 business days has elapsed, any requestor will be provided a copy of OGC's recommendation memorandum and an accompanying vote certification, or if no such certification exists, a cover page stating the disposition of the memoranda. Confidential information will be redacted as necessary.

After the request review process has concluded, or a Final Audit Report has been approved, a copy of the request for consideration, as well as the recommendation memorandum and accompanying vote certification or disposition memorandum, will be placed with the Committee's filings or audit documents on the Commission's Web site within 30 days. These materials will also be placed on the Commission's Web page dedicated to legal questions considered by the Commission under this program.

This procedure is not intended to circumvent or supplant the Advisory Opinion process provided under 52 U.S.C. 30108 and 11 CFR part 112. Accordingly, any legal issues that qualify for consideration under the Advisory Opinion process are not appropriate for consideration under this new procedure. Additionally, this policy statement does not supersede the procedures regarding eligibility and entitlement to public funds set forth in Commission Directive 24 and 11 CFR 9005.1, 9033.4, 9033.6 or 9033.10.

II. Annual Review

No later than July 1 of each year, the OC and OGC shall jointly prepare and distribute to the Commission a written report containing a summary of the requests made under the program over the previous year and a summary of the Commission's consideration of those requests and any action taken thereon. The annual report shall also include the Chief Compliance Officer's and the General Counsel's assessment of whether, and to what extent, the program has promoted efficiency and fairness in both the Commission's report review process and in the audit process, as well as their recommendations, if any, for modifications to the program.

The Commission may terminate or modify this program through additional policy statements at any time by an affirmative vote of four of its members.

On behalf of the Commission.

Dated: May 5, 2016.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2016–11145 Filed 5–12–16; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

May 11, 2016.

TIME AND DATE: 10:00 a.m., Thursday, May 26, 2016.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Hecla Limited, et al.,* Docket Nos. WEST 2012–760–M, et al. (Issues include whether the Judge erred in ruling that the operator did not violate the standard requiring that ground conditions be examined and tested.).

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2016–11453 Filed 5–11–16; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

May 11, 2016.

TIME AND DATE: 10:00 a.m., Wednesday, May 25, 2016.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matter *Secretary of Labor* v. *Hecla Limited, et al.,* Docket Nos. WEST 2012–760–M, et al. (Issues include whether the Judge erred in ruling that the operator did not violate the standard requiring that ground conditions be examined and tested.).

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO: Emogene Johnson (202) 434–9935/(202)

708–9300 for TDD Relay/1–800–877–8339 for toll free.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2016–11454 Filed 5–11–16; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than June 3, 2016.

A. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *First State Bank of St. Charles Employee Stock Ownership Plan, St. Charles, Missouri, with GreatBanc Trust Company, Lisle, Illinois, as trustee, and Kjersti L. Cory, Quincy, Illinois, as the individual acting as corporate trustee;* to acquire voting shares of First State Bancshares, Inc., St. Charles, Missouri, and thereby increase its indirect control of First State Bank of St. Charles, Missouri, St. Charles, Missouri.

Board of Governors of the Federal Reserve System, May 9, 2016.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2016–11242 Filed 5–12–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1646–N]

Medicare Program; Public Meeting on July 18, 2016 Regarding New and Reconsidered Clinical Diagnostic Laboratory Test Codes for the Clinical Laboratory Fee Schedule for Calendar Year 2017

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces a public meeting to receive comments and recommendations (including accompanying data on which recommendations are based) from the public on the appropriate basis for establishing payment amounts for new or substantially revised Healthcare Common Procedure Coding System (HCPCS) codes being considered for Medicare payment under the clinical laboratory fee schedule (CLFS) for calendar year (CY) 2017. This meeting also provides a forum for those who submitted certain reconsideration requests regarding final determinations made last year on new test codes and for the public to provide comment on the requests.

DATES:

Meeting Date: The public meeting is scheduled for Monday, July 18, 2016 from 9:00 a.m. to 3:00 p.m., Eastern Daylight Savings Time (E.D.T.)

Deadline for Registration of Presenters and Submission of Presentations: All presenters for the public meeting must register and submit their presentations electronically to Glenn McGuirk at *Glenn.McGuirk@cms.hhs.gov* by July 1, 2016 E.D.T.

Deadline for Submitting Requests for Special Accommodations: Requests for special accommodations must be received no later than 5:00 p.m. on July 1, 2016 E.D.T.

Deadline for Submission of Written Comments: We intend to publish our proposed determinations for new test codes and our preliminary determinations for reconsidered codes (as described below in section II. Format) for CY 2017 by early September 2016. Interested parties may submit written comments on these determinations by early October, 2016, to the address specified in the **ADDRESSES** section of this notice or electronically to Glenn McGuirk at *Glenn.McGuirk@cms.hhs.gov* (the specific date for the publication of these determinations on the CMS Web site, as well as the deadline for submitting comments regarding these determinations will be published on the CMS Web site).

ADDRESSES: The public meeting will be held in the main auditorium of the Centers for Medicare & Medicaid Services (CMS), Central Building, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

FOR FURTHER INFORMATION CONTACT: Glenn McGuirk, (410) 786–5723.

SUPPLEMENTARY INFORMATION:

I. Background

Section 531(b) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554) requires the Secretary of the Department of Health and Human Services (the Secretary) to establish procedures for coding and payment determinations for new clinical diagnostic laboratory tests under Part B of title XVIII of the Social Security Act (the Act) that permit public consultation in a manner consistent with the procedures established for implementing coding modifications for International Classification of Diseases (ICD–9–CM). The procedures and public meeting announced in this notice for new tests are in accordance with the procedures published on November 23, 2001 in the **Federal Register** (66 FR 58743) to implement section 531(b) of BIPA.

Section 942(b) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) added section 1833(h)(8) of the Act. Section 1833(h)(8)(A) of the Act requires the Secretary to establish by regulation procedures for determining the basis for, and amount of, payment for any clinical diagnostic laboratory test with respect to which a new or substantially revised Healthcare Common Procedure Coding System (HCPCS) code is assigned on or after January 1, 2005 (hereinafter referred to as "new tests"). A code is considered to be substantially revised if there is a substantive change to the definition of the test or procedure to which the code applies (such as, a new analyte or a new methodology for measuring an existing analyte-specific test). (See section 1833(h)(8)(E)(ii) of the Act.)

Section 1833(h)(8)(B) of the Act sets forth the process for determining the basis for, and the amount of, payment for new tests. Pertinent to this notice, section 1833(h)(8)(B)(i) and (ii) of the Act requires the Secretary to make available to the public a list that includes any such test for which establishment of a payment amount is being considered for a year and, on the same day that the list is made available, causes to have published a notice in the **Federal Register** of a meeting to receive comments and recommendations (including accompanying data on which recommendations are based) from the public on the appropriate basis for establishing payment amounts for the tests on such list. This list of codes for which the establishment of a payment amount under the clinical laboratory fee schedule (CLFS) is being considered for calendar year (CY) 2017 is posted on the CMS Web site at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/.* Section 1833(h)(8)(B)(iii) of the Act requires that we convene the public meeting not less than 30 days after publication of the notice in the **Federal Register**. These requirements are codified at 42 CFR part 414, subpart G.

Two bases of payment are used to establish payment amounts for new tests. The first basis, called "crosswalking," is used when a new test code is determined to be comparable to an existing test code, multiple existing test codes, or a portion of an existing test code. The new test code is assigned the local fee schedule amounts and the national limitation amount of the existing test. Payment for the new test is made at the lesser of the billed amount, the local fee schedule amount, or the national limitation amount. (See § 414.508(a).)

The second basis called "gapfilling," is used when no comparable existing test is available. When using this method, instructions are provided to each Part A and Part B Medicare Administrative Contractor (MAC) to determine a payment amount for its Part B geographic area) for use in the first year. The contractor-specific amounts are established for the new test code using the following sources of information, if available: (1) Charges for the test and routine discounts to charges; (2) resources required to perform the test; (3) payment amounts determined by other payers; and (4) charges, payment amounts, and resources required for other tests that may be comparable or otherwise relevant. (See § 414.508(b) and § 414.509 for more information regarding the gapfilling process.)

Under section 1833(h)(8)(B)(iv) of the Act, the Secretary, taking into account the comments and recommendations (and accompanying data) received at the public meeting, develops and makes available to the public a list of proposed determinations with respect to the appropriate basis for establishing a payment amount for each code, an explanation of the reasons for each determination, the data on which the determinations are based, and a request for public written comments on the proposed determinations. Under section 1833(h)(8)(B)(v) of the Act, taking into account the comments received on the proposed determinations during the public comment period, the Secretary then develops and makes available to the public a list of final determinations of final payment amounts for new test codes along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public.

After the final determinations have been posted on the CMS Web site, the public may request reconsideration of the basis and amount of payment for a new test as set forth in § 414.509. Pertinent to this notice, those requesting that CMS reconsider the basis for payment or, for crosswalking, reconsider the payment amount as set forth in § 414.509(a) and (b)(1) may present their reconsideration requests at the following year's public meeting provided that the requestor made the request to present at the public meeting in the written reconsideration request. For purposes of this notice, we refer to these codes as the "reconsidered codes." The public may comment on the reconsideration requests. (See the November 27, 2007 CY 2008 Physician Fee Schedule final rule with comment period (72 FR 66275 through 66280) for more information on these procedures.)

II. Format

We are following our usual process, including an annual public meeting to determine the appropriate basis and payment amount for new and reconsidered test codes under the CLFS for CY 2017.

This meeting is open to the public. The on-site check-in for visitors will be held from 8:30 a.m. to 9:00 a.m., followed by opening remarks. Registered persons from the public may discuss and make recommendations for specific new and reconsidered test codes for the CY 2017 CLFS.

We note that the July 2016 Clinical Diagnostic Laboratory Tests (CDLT) Advisory Panel meeting and the laboratory public meeting will be a joint meeting this year, on July 18, 2016. The announcement for the CDLT Advisory Panel meeting will be included in a separate **Federal Register** notice.

Because of time constraints, presentations must be brief, lasting no longer than 10 minutes, and must be accompanied by three written copies. In addition, presenters should make copies available for approximately 50 meeting participants, since CMS will not be providing additional copies. Written presentations must be electronically submitted to CMS on or before July 1, 2016. Presentation slots will be assigned on a first-come, first-served basis. In the event that there is not enough time for presentations by everyone who is interested in presenting, CMS will gladly accept written presentations from those who were unable to present due to time constraints. Presentations should be sent via email to Glenn McGuirk, at *Glenn.McGuirk@cms.hhs.gov.* For reconsidered and new test codes, presenters should address all of the following 5 items:

(1) Reconsidered or new test codes and descriptor.

(2) Test purpose and method.

(3) Costs.

(4) Charges.

(5) Recommendation with rationale for one of the two bases (crosswalking or gapfilling) for determining payment for reconsidered and new tests.

Additionally, the presenters should provide the data on which their recommendations are based. Written presentations from the public meeting will be available upon request, via email to Glenn McGuirk at *Glenn.McGuirk@cms.hhs.gov.* Presentations regarding reconsidered and new test codes that do not address the above five items for presenters may be considered incomplete and may not be considered by CMS when making a determination. However, we may request missing information following the meeting to prevent a recommendation from being considered incomplete.

Taking into account the comments and recommendations (and accompanying data) received at the public meeting, we intend to post our proposed determinations with respect to the appropriate basis for establishing a payment amount for each new test code and our preliminary determinations with respect to the reconsidered codes along with an explanation of the reasons for each determination, the data on which the determinations are based, and a request for public written comments on these determinations on the CMS Web site by early September 2016. This Web site can be accessed at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/.* We also will include a summary of all comments received by August 8, 2016 (15 business days after the meeting). Interested parties may submit written comments on the proposed determinations for new test codes or the preliminary determinations for reconsidered codes by early October, 2016, to the address specified in the **ADDRESSES** section of this notice or electronically to Glenn McGuirk at *Glenn.McGuirk@cms.hhs.gov* (the specific date for the publication of the determinations on the CMS Web site, as well as the deadline for submitting comments regarding the determinations, will be published on the CMS Web site). Final determinations for new test codes to be included for payment on the CLFS for CY 2017 and reconsidered codes will be posted on the CMS Web site in November 2016, along with the rationale for each determination, the data on which the determinations are based, and responses to comments and suggestions received from the public. The final determinations with respect to reconsidered codes are not subject to further reconsideration. With respect to the final determinations for new test codes, the public may request reconsideration of the basis and amount of payment as set forth in § 414.509.

III. Registration Instructions

The Division of Ambulatory Services in the CMS Center for Medicare is coordinating the public meeting registration. Beginning June 6, 2016, registration may be completed on-line at the following Web site: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ClinicalLabFeeSched/index.html?redirect=/ClinicalLabFeeSched/*. All the following information must be submitted when registering:

- Name.
- Company name.
- Address.
- Telephone numbers.
- Email addresses.

When registering, individuals who want to make a presentation must also specify, which new test codes they will be presenting comments. A confirmation will be sent upon receipt of the registration. Individuals must register by the date specified in the **DATES** section of this notice.

IV. Security, Building, and Parking Guidelines

The meeting will be held in a Federal government building; therefore, Federal security measures are applicable. In planning your arrival time, we recommend allowing additional time to clear security. It is suggested that you arrive at the CMS facility between 8:15 a.m. and 8:30 a.m., so that you will be able to arrive promptly at the meeting by 9:00 a.m. Individuals who are not registered in advance will not be permitted to enter the building and will be unable to attend the meeting. The public may not enter the building earlier than 8:15 a.m. (45 minutes before the convening of the meeting).

Security measures include the following:

- Presentation of government-issued photographic identification to the Federal Protective Service or Guard Service personnel. Persons without proper identification may be denied access to the building.
- Interior and exterior inspection of vehicles (this includes engine and trunk inspection) at the entrance to the grounds. Parking permits and instructions will be issued after the vehicle inspection.
- Passing through a metal detector and inspection of items brought into the building. We note that all items brought to CMS, whether personal or for the purpose of demonstration or to support a demonstration, are subject to inspection. We cannot assume responsibility for coordinating the receipt, transfer, transport, storage, set-up, safety, or timely arrival of any personal belongings or items used for demonstration or to support a demonstration.

V. Special Accommodations

Individuals attending the meeting who are hearing or visually impaired and have special requirements, or a condition that requires special assistance, should provide that information upon registering for the meeting. The deadline for registration is listed in the **DATES** section of this notice.

Dated: April 11, 2016.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2016–11269 Filed 5–12–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Tribal Child Support Enforcement Direct Funding Request: 45 CFR 309—Plan.

OMB No.: 0970–0218.

Description: The final rule within 45 CFR part 309, published in the **Federal Register** on March 30, 2004, contains a regulatory reporting requirement that, in order to receive funding for a Tribal IV–D program a Tribe or Tribal organization must submit a plan describing how the Tribe or Tribal organization meets or plans to meet the objectives of section 455(f) of the Social Security Act, including establishing paternity, establishing, modifying, and enforcing support orders, and locating noncustodial parents. The plan is required for all Tribes requesting funding; however, once a Tribe has met the requirements to operate a comprehensive program, a new plan is not required annually unless a Tribe makes changes to its title IV–D program. Tribes and Tribal organizations must respond if they wish to operate a fully funded program. This paperwork collection activity is set to expire in December 31, 2016.

Respondents: Tribes and Tribal Organizations.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
45 CFR 309—Plan	60	2	480	57,600

Estimated Total Annual Burden Hours: 57,600.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington DC 20201. Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2016–11325 Filed 5–12–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–0880]

Frequently Asked Questions About Medical Foods; Second Edition; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a guidance for industry entitled "Frequently Asked Questions About Medical Foods; Second Edition." FDA published earlier versions of the guidance in May 1997 and May 2007. The second edition of the guidance provides responses to additional questions regarding the definition and labeling of medical foods and updates some prior responses.

DATES: Submit either electronic or written comments on FDA guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov*.
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2013–D–0880 for "Frequently Asked Questions About Medical Foods; Second Edition." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov*. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to Office of Nutrition and Food Labeling, Center for Food Safety and Applied Nutrition (HFS–850), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance.

FOR FURTHER INFORMATION CONTACT: Shawne Suggs-Anderson, Center for Food Safety and Applied Nutrition (HFS–850), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1451.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a guidance for industry, entitled "Frequently Asked Questions About Medical Foods; Second Edition." We are issuing this guidance consistent with our good guidance practices regulation

(21 CFR 10.115). The guidance represents the current thinking of FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

In the **Federal Register** of August 13, 2013 (78 FR 49271), we announced the availability of a draft guidance for industry entitled "Frequently Asked Questions About Medical Foods; Second Edition." We invited comment on the draft guidance by October 15, 2013. On November 14, 2013, we reopened the comment period giving interested parties an additional 30 days until December 16, 2013, to submit comments (78 FR 68460).

This guidance is intended to provide industry with a convenient place to find answers to frequently asked questions about medical foods. FDA published earlier versions of the guidance in May 1997 and May 2007. This guidance is a second edition of the May 2007 guidance entitled "Guidance for Industry: Frequently Asked Questions About Medical Foods." The second edition of the guidance provides responses to additional questions regarding the definition and labeling of medical foods and updates some of the prior responses. The second edition also provides FDA's thinking relating to the labeling of medical foods to be used under supervision by a physician, whether medical foods can be labeled with "Rx Only," and types of diseases and conditions that a medical food could be used to manage.

We received numerous comments on the draft guidance and have modified the final guidance where appropriate. In addition, we made editorial changes to improve clarity. The guidance announced in this notice finalizes the draft guidance dated August 2013.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 101.3, 101.4, 101.5, 101.15, and 101.105 have been approved under OMB control number 0910–0381. The collection of information under 21 CFR 1, part 1 subpart H has been approved under OMB control number 0910–0502. The collections of information in 21 CFR 113.100 and 114.100 (a) through (d) have been approved under OMB control number 0910–0037.

III. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/FoodGuidances* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the guidance.

Dated: May 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–11268 Filed 5–12–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0221]

Agency Information Collection Activities; Proposed Collection; Submission for Office of Management and Budget Review; Food Labeling; Notification Procedures for Statements on Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA).

DATES: Fax written comments on the collection of information by June 13, 2016.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0331. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Food Labeling; Notification Procedures for Statements on Dietary Supplements—21 CFR 101.93

OMB Control Number 0910–0331—Extension

Section 403(r)(6) of the FD&C Act (21 U.S.C. 343(r)(6)) and its implementing regulation, 21 CFR 101.93, require that we be notified by the manufacturer, packer, or distributor of a dietary supplement that it is marketing a dietary supplement product that bears on its label or in its labeling a statement provided for in section 403(r)(6) of the FD&C Act. These provisions require that we be notified, with a submission about such statements, no later than 30 days after the first marketing of the dietary supplement. Information that is required in the submission includes: (1) The name and address of the manufacturer, packer, or distributor of the dietary supplement product; (2) the text of the statement that is being made; (3) the name of the dietary ingredient or supplement that is the subject of the statement; (4) the name of the dietary supplement (including the brand name); and (5) the signature of a responsible individual or the person who can certify the accuracy of the information presented, and who must certify that the information contained in the notice is complete and accurate, and that the notifying firm has substantiation that the statement is truthful and not misleading.

We have developed an electronic form (Form FDA 3955) that interested persons will be able to use to electronically submit their notifications to us via FDA's Unified Registration and Listing System (FURLS). Firms that prefer to submit a paper notification in a format of their own choosing will still have the option to do so, however. Form FDA 3955 prompts a respondent to include certain elements in their structure/function claim notification (SFCN) described in § 101.93 in a standard format electronically and helps the respondent organize their SFCN to include only the information needed for our review of the claim. Note that the SFCN, whether electronic or paper, is used for all claims made pursuant to section 403(r)(6) of the FD&C Act, including nutrient deficiency claims and general well-being claims in addition to structure/function claims. The electronic form, and any optional elements that would be prepared as attachments to the form (*e.g.,* label), can be submitted in electronic format via FURLS. Submissions of SFCNs will continue to be allowed in paper format. We use this information to evaluate whether statements made for dietary ingredients or dietary supplements are permissible under section 403(r)(6) of the FD&C Act. Draft screenshots of Form FDA 3955 and instructions are available for comment at *http://www.fda.gov/Food/DietarySupplements/IndustryInfo/ucm485532.htm.*

Description of Respondents: Respondents to this collection of information include manufacturers, packers, or distributors of dietary supplements that bear section 403(r)(6) of the FD&C Act statements on their labels or labeling.

In the **Federal Register** of March 11, 2016 (81 FR 12910), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one comment in support of the information collection.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
101.93	2,200	1	2,200	0.75 (45 minutes)	1,650

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We believe that there will be minimal burden on the industry to generate information to meet the notification requirements of section 403(r)(6) of the FD&C Act by submitting information regarding section 403(r)(6) of the FD&C Act statements on labels or in labeling of dietary supplements. We also believe that submission via FURLS will not affect the burden estimates. We are requesting only information that is immediately available to the manufacturer, packer, or distributor of the dietary supplement that bears such a statement on its label or in its labeling. We estimate that, each year, approximately 2,200 firms will submit the information required by section 403(r)(6) of the FD&C Act. This estimate is based on the average number of notification submissions received by us in the preceding 3 years. We estimate that a firm will require 0.75 hours to gather the information needed and prepare a communication to us, for a total of 1,650 hours (2,200 × 0.75).

Dated: May 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–11272 Filed 5–12–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0001]

Advisory Committee; Pulmonary-Allergy Drugs Advisory Committee, Renewal

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; renewal of advisory committee.

SUMMARY: The Food and Drug Administration (FDA) is announcing the renewal of the Pulmonary-Allergy Drugs Advisory Committee by the Commissioner of Food and Drugs (the Commissioner). The Commissioner has determined that it is in the public interest to renew the Pulmonary-Allergy Drugs Advisory Committee for an additional 2 years beyond the charter expiration date. The new charter will be in effect until May 30, 2018.

DATES: Authority for the Pulmonary-Allergy Drugs Advisory Committee will expire on May 30, 2016, unless the Commissioner formally determines that renewal is in the public interest.

FOR FURTHER INFORMATION CONTACT: Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, *PADAC@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Issued in 41 CFR 102–3.65 and approval by the Department of Health and Human Services issued in 45 CFR part 11 and by the General Services Administration, FDA is announcing the renewal of the Pulmonary-Allergy Drugs Advisory Committee. The committee is a discretionary Federal advisory committee established to provide advice to the Commissioner. The Pulmonary-Allergy Drugs Advisory Committee advises the Commissioner or designee in discharging responsibilities as they relate to helping to ensure safe and effective drugs for human use and, as required, any other product for which the Food and Drug Administration has regulatory responsibility. The Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of pulmonary disease and diseases with allergic and/or immunologic mechanisms and makes appropriate recommendations to the Commissioner of Food and Drugs.

The Committee shall consist of a core of 11 voting members including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities knowledgeable in the fields of pulmonary medicine, allergy, clinical immunology, and epidemiology or statistics. Members will be invited to serve for overlapping terms of up to four years. Almost all non-Federal members of this committee serve as Special Government Employees. The core of voting members may include one technically qualified member, selected by the Commissioner or designee, who is identified with consumer interests and is recommended by either a consortium of consumer-oriented organizations or other interested persons. In addition to the voting members, the Committee may include one non-voting member who is identified with industry interests.

Further information regarding the most recent charter and other information can be found at *http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/Pulmonary-AllergyDrugsAdvisoryCommittee/ucm107567.htm* or by contacting the Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**). Since no change has been made to the committee name or description of duties, no amendment will be made to 21 CFR 14.100.

This document is issued under the Federal Advisory Committee Act (5 U.S.C. app.). For general information related to FDA advisory committees, please visit us at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

Dated: May 10, 2016.

Jill Hartzler Warner,

Associate Commissioner for Special Medical Programs.

[FR Doc. 2016–11323 Filed 5–12–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–0971]

Infectious Disease Next Generation Sequencing Based Diagnostic Devices: Microbial Identification and Detection of Antimicrobial Resistance and Virulence Markers; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance entitled "Infectious Disease Next Generation Sequencing Based Diagnostic Devices: Microbial Identification and Detection of Antimicrobial Resistance and Virulence Markers." This draft guidance provides recommendations to assist industry in designing studies to establish the analytical and clinical performance characteristics of infectious disease next generation sequencing-based diagnostic devices for microbial identification and detection of antimicrobial resistance and virulence markers. This draft guidance is neither final nor is it in effect at this time.

DATES: Although you can comment on any guidance at any time (*see* 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment of this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by August 11, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–D–0971 for "Infectious Disease Next Generation Sequencing Based Diagnostic Devices: Microbial Identification and Detection of Antimicrobial Resistance and Virulence Markers; Draft Guidance for Industry; Availability." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION". The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Heike Sichtig, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4526, Silver Spring, MD 20993–0002, 301–796–4574.

SUPPLEMENTARY INFORMATION:

I. Background

This draft guidance provides recommendations to assist industry in designing studies to establish the analytical and clinical performance characteristics of "Infectious Disease Next Generation Sequencing Based Diagnostic Devices" for microbial identification and detection of antimicrobial resistance and virulence markers (hereinafter referred to as "Infectious Disease NGS Dx devices"). Infectious Disease NGS Dx devices are intended for use as an aid in the diagnosis of microbial infection and in selecting appropriate therapies for which next generation sequencing (NGS) technology can now be used to detect the presence of clinically important pathogenic organisms in human specimens.

In contrast to human sequencing diagnostics, infectious disease sequencing diagnostics carry an absolute need for immediate and actionable results, sometimes within hours, as incorrect initial diagnoses potentially leads to fatalities. Furthermore, the broad range of specimen types (*e.g.,* urine, blood, cerebrospinal fluid (CSF), stool, sputum, etc.) and the large diversity of the infectious disease agents that can be present in the sample do not allow straightforward pre-analytical-, biochemical-, or bioinformatics processes. Each unique specimen type may require a different nucleic acid extraction procedure, a different library preparation protocol, and even a different bioinformatics algorithm to generate the final clinical result. The opportunity for repeat testing is expected to be limited due to a frequently small specimen quantity (*e.g.,* CSF) and the necessity to make a prompt and timely infectious disease treatment decision for the patient.

This draft guidance, when finalized, provides detailed information on the types of studies the FDA recommends to support a premarket application for these devices. This draft guidance specifically addresses Infectious Disease NGS devices that employ targeted or agnostic (metagenomic) sequencing, to identify the presence or absence of infectious disease organisms, and/or to detect the presence or absence of antimicrobial resistance and virulence markers. This draft guidance is not intended to address devices that utilize detection mechanisms other than nucleic acid based approaches. Further, this draft guidance does not apply to devices that are intended to screen donors of blood and blood components as well as donors of human cells, tissues, and cellular and tissue-based products for communicable diseases.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on "Infectious Disease Next Generation Sequencing Based Diagnostic Devices: Microbial Identification and Detection of Antimicrobial Resistance and Virulence Markers." It neither creates nor confers any rights for or on any person and is not binding on FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov.* Persons unable to download an electronic copy of "Infectious Disease Next Generation Sequencing Based Diagnostic Devices: Microbial Identification and Detection of Antimicrobial Resistance and Virulence Markers; Draft Guidance for Industry and Food and Drug Administration Staff; Availability" may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1500016 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR parts 801 and 809 have been approved under OMB control number 0910–0485; the collections of information in 21 CFR part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 812 have been approved under OMB control number 0910–0078; and the collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231.

Dated: May 9, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–11237 Filed 5–12–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Health Center Program

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice of Class Deviations from the Requirements for Competition and Application Period for the Health Center Program.

SUMMARY: In accordance with the Grants Policy and Administration Manual (GPAM) Part F: Chapter 2.b.34 and Part F: Chapter 3.b.16, the Bureau of Primary Health Care (BPHC) has been granted class deviations from the requirements for competition contained in the GPAM Part F: Chapter 2.a.1 and the requirements for application period contained in the GPAM Part F: Chapter 3.b.3 to expeditiously award funds to new health centers to improve access to services and clinical outcomes for the nation's most vulnerable populations through the patient centered medical home model.

SUPPLEMENTARY INFORMATION:

Intended Recipient of the Award: Health Center Program award recipients receiving Health Center Program funding for the first time in fiscal years (FYs) 2012, 2013, 2014, and 2015.

Amount of Competitive Awards: Approximately $10 million will be awarded in FY 2016 through a one-time supplement.

Period of Supplemental Funding: Anticipated 12 month project period is August 1, 2016, through July 31, 2017.

CFDA Number: 93.224

Authority: Section 330 of the Public Health Service Act, as amended (42 U.S.C. 254b, as amended).

Justification: Targeting the nation's neediest populations and geographic areas, the Health Center Program supports more than 1,300 health centers that operate over 9,000 service delivery sites in every state, the District of Columbia, Puerto Rico, the Virgin Islands, and the Pacific Basin. Nearly 23 million patients received comprehensive, culturally competent, quality primary health care services through the Health Center Program award recipients in 2014.

The FY 2016 Health Center Program Patient Centered Medical Home Supplement is a one-time supplemental funding opportunity that supports the upfront costs new Health Center Program award recipients face to become patient centered medical homes. Organizational transformation to achieve initial and more advanced levels of patient centered medical home recognition is costly. As of September 2015, data show that among the health centers eligible for this award only approximately 20 percent have achieved patient centered medical home recognition compared to 65 percent across all health centers. The discrepancy suggests the efficacy of BPHC's past investments in FY 2011 and FY 2012 that supported health centers funded before FY 2012 achieve patient centered medical home recognition. The FY 2016 Health Center Program Patient Centered Medical Home Supplement is the first funding not tied to capital improvements that BPHC has offered to support health centers' evolution to patient centered medical homes since FY 2012.

FOR FURTHER INFORMATION CONTACT: Olivia Shockey, Expansion Division Director, Office of Policy and Program Development, Bureau of Primary Health Care, Health Resources and Services Administration at 301–443–9282 or *oshockey@hrsa.gov.*

Dated: May 5, 2016.

James Macrae,

Acting Administrator.

[FR Doc. 2016–11413 Filed 5–12–16; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

John G. Pastorino, Ph.D., Rowan University School of Osteopathic Medicine: Based on an assessment conducted by Rowan University School of Osteopathic Medicine (RUSOM), the Respondent's desire to conclude the matter, and analysis conducted by ORI in its oversight review, ORI found that Dr. John G. Pastorino, Associate Professor, Department of Molecular Biology, RUSOM, engaged in research misconduct in research supported by National Institute on Alcohol Abuse and Alcoholism (NIAAA), National Institutes of Health (NIH), grant R01 AA012897 and National Cancer Institute (NCI), NIH, grant R01 CA118356.

ORI found that Respondent engaged in research misconduct by intentionally falsifying and/or fabricating data reported in the following eight (8) published papers, one (1) unpublished manuscript, and one (1) NIH grant application:

- *J. Cell. Sci.* 123:894–902, 2010 (hereafter referred to as "*J. Cell. Sci.* 2010a")
- *J. Cell. Sci.* 123:4117–4127, 2010 (hereafter referred to as "*J. Cell. Sci.* 2010b")
- *J. Cell. Sci.* 125:2995–3003, 2012 (hereafter referred to as "*J. Cell. Sci.* 2012")
- *J. Cell. Sci.* 126:274–288, 2013 (hereafter referred to as "*J. Cell. Sci.* 2013")
- *J. Cell. Sci.* 127:896–907, 2014 (hereafter referred to as "*J. Cell. Sci.* 2014")
- *Biol. Open.* 1–11:10;bio.014712, 2015 (hereafter referred to as "*Biol. Open.* 2015")
- *BioChim Biophys Acta.* 1827:38–49, 2013 (hereafter referred to as "*BioChim Biophys Acta.* 2013")
- *J. Biol. Chem.* 289:26213–26225, 2014 (hereafter referred to as "*J. Biol. Chem.* 2014")
- *J. Cell. Science,* Submitted manuscript, 2015 (hereafter referred to as "*J. Cell. Sci.* manuscript 2015")
- R01 HL132672–01, "Regulation by Sirtuin-3 and Mitoneet of the Permeability Transition Pore in Heart during Ischemia/Reperfusion Injury," John Pastorino, Ph.D., Principal Investigator ORI found that Dr. Pastorino falsified and/or fabricated Western blot data for mitochondrial function related to cell/tissue injury, in fifty-eight (58) blot panels included in forty-two (42) figures in eight (8) publications, one (1) unpublished manuscript, and one (1) grant application. In the absence of valid Western blot images, the Respondent fabricated and/or falsified quantitative data in associated bar graphs, statistical analyses presented in figure legends, and related text.

Specifically, ORI found that Respondent duplicated images, or trimmed and/or manipulated blot images from unrelated sources to obscure their origin, and relabeled them to represent different experimental results in:

- Figures 2A, 2C, 3B, 5A, 7B, and 8A in *J. Cell. Sci.* 2010a
- Figures 2B, 5A, 6A, and 6B in *J. Cell. Sci.* 2010b
- Figures 1A, 2A, 2B, 4C, 5A, 5B, 6A, 7A, 7B, and 7C in *J. Cell. Sci.* 2012
- Figures 4F, 5H, and 6A in *J. Cell. Sci.* 2013
- Figures 1B, 2B, 2C, 3A, 3B, and 4D in *J. Cell. Sci.* 2014
- Figures 3A and 6B in *Biol. Open* 2015
- Figure 2A in *BioChim Biophys Acta.* 2013
- Figures 1B, 3A, 4D, 5E, and 6C in *J. Biol. Chem.* 2014
- Figure 3A in *J. Cell. Sci.* manuscript 2015
- Figures 3, 8A, 12, and 13A in R01 HL132672–01 NIH grant application

Dr. Pastorino has entered into a Voluntary Exclusion Agreement (Agreement) and has voluntarily agreed for a period of five (5) years, beginning on April 27, 2016:

(1) To exclude himself from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government referred to as "covered transactions" pursuant to HHS' Implementation (2 CFR part 376 *et seq.*) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the "Debarment Regulations");

(2) that he will neither apply for nor permit his name to be used on any application, proposal, or other request for funds to the United States Government or any of its agencies, as defined in the Debarment Regulations; Respondent will further ensure that during the period of the voluntary exclusion, he will neither receive nor be supported by funds of the United States Government and its agencies made available through grants, subgrants, cooperative agreements, contracts, or subcontracts, as discussed in the Debarment Regulations; and

(3) to exclude himself from serving in any advisory capacity to the U.S. Public Health Service (PHS) including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

Kathryn Partin,

Director, Office of Research Integrity.

[FR Doc. 2016–11317 Filed 5–12–16; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Request for Information for Developing the National Cancer Moonshot Initiative

SUMMARY: This Request for Information (RFI) describes ways in which the cancer research community and public can provide new ideas and comment on proceedings of the National Cancer Advisory Board (NCAB) Blue Ribbon Panel under the umbrella of the National Cancer Moonshot Initiative.

DATES: Responses should be submitted to the National Cancer Institute (NCI), National Institutes of Health (NIH) on or before 5:00 p.m. EST on July 1, 2016.

ADDRESSES: Electronic responses are preferred and should be addressed or submitted to either: (1) The online platform, Cancer Research Ideas, at *https://cancerresearchideas.cancer.gov;* or (2) email to *cancerresearch@nih.gov.* Non-electronic responses will also be accepted by calling the NCI Cancer Information Service at 1–800–422–6237 or by mail to Blue Ribbon Panel, National Cancer Moonshot Initiative, National Cancer Institute, 9609 Medical Center Drive, Bethesda, MD 20892–9760.

FOR FURTHER INFORMATION: Questions about this request for information should be directed to Kelli Marciel, National Cancer Institute, 9609 Medical Center Drive, Bethesda, MD 20892–9760, *Kelli.Marciel@nih.gov,* 301–594–3330.

SUPPLEMENTARY INFORMATION: During his State of the Union address on January 12, 2016, President Barack Obama announced the establishment of a new National Cancer Moonshot Initiative to accelerate cancer research. The initiative, led by Vice President Joe Biden, aims to make more therapies available to more patients, while also improving our ability to prevent cancer and detect it at an early stage. Additional details of the National Cancer Moonshot Initiative are available at *http://www.cancer.gov/research/key-initiatives/moonshot-cancer-initiative.*

The White House and Vice President Biden have named a Task Force of 13 heads of federal agencies and offices who will advise the administration on research priorities. To ensure that the National Cancer Moonshot Initiative's goals and approaches are grounded in the best science, President Obama directed the Moonshot Task Force to consult with external experts, including the presidentially appointed National Cancer Advisory Board (NCAB). A Blue Ribbon Panel of experts has been established as a working group of the NCAB that will assist the board in providing this advice.

The Blue Ribbon Panel is composed of leading experts from a broad range of scientific areas, including biology, immunology, genomics, diagnostics, bioinformatics, and cancer prevention and treatment. Members also include investigators with expertise in clinical trials and cancer health disparities. In addition to researchers, the panel membership also includes clinicians and nurses, and representatives of cancer advocacy organizations and the pharmaceutical and biotechnology industries.

The Blue Ribbon Panel will focus on identifying scientific opportunities in cancer research that could produce major advances with additional emphasis and funding, and propose ways to overcome barriers to pursuing these opportunities.

Community input is critical to the success of the National Cancer Moonshot Initiative. Indeed, the success of the initiative will depend on breaking down silos and encouraging everyone with an interest in fighting cancer to work together, share information, and collaborate on solutions. To enable the Blue Ribbon Panel to consider a wide range of input from researchers, scientists, physicians, advocates, students, data scientists, and members of the public, anyone with a scientific idea or suggestion for addressing cancer research challenges can contribute by visiting *https://cancerresearchideas.cancer.gov.*

Input is sought in the following areas:

- Expanding clinical trials
- Enhanced data sharing
- Cancer immunology and prevention
- Implementation sciences
- Pediatric cancer
- Precision, prevention and early detection
- Tumor evolution and progression

This RFI is for planning purposes only and should not be construed as a solicitation for applications or proposals, or as an obligation in any way on the part of the United States Federal government. The Federal government will not pay for the preparation of any information submitted or for the government's use. Additionally, the government cannot guarantee the confidentiality of the information provided.

Dated: May 5, 2016.

Dinah Singer,

Acting Deputy Director, National Cancer Institute.

[FR Doc. 2016–11283 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; RFA Review and Reverse Site Visit of INIA NEUROIMMUNE Consortium.

Date: June 24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott New Orleans, 614 Canal Street, New Orleans, LA 70130.

Contact Person: Beata Buzas, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm. 2081, Rockville, MD 20852, 301–443–0800, *bbuzas@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: May 9, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11257 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review; Group Diabetes, Endocrinology and Metabolic Diseases B Subcommittee.

Date: June 8–9, 2016.

Open: June 08, 2016, 8:00 a.m. to 8:30 a.m.

Agenda: To review policy and procedures.

Place: New Orleans Downtown Marriott—Convention Center, 859 Convention Center Blvd., New Orleans, LA 70130.

Closed: June 08, 2016, 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications

Place: New Orleans Downtown Marriott—Convention Center, 859 Convention Center Blvd., New Orleans, LA 70130.

Closed: June 09, 2016, 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: New Orleans Downtown Marriott—Convention Center, 859 Convention Center Blvd., New Orleans, LA 70130.

Contact Person: John F. Connaughton, Ph.D., Chief, Chartered Committees Section, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7007, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7797, *connaughtonj@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Subcommittee.

Date: June 14–16, 2016.

Open: June 14, 2016, 4:00 p.m. to 4:30 p.m.

Agenda: To review policy and procedures.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 14, 2016, 4:30 p.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 15, 2016, 8:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 16, 2016, 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Barbara A. Woynarowska, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7009, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Digestive Diseases and Nutrition C Subcommittee.

Date: June 22–24, 2016.

Open: June 22, 2016, 3:00 p.m. to 3:30 p.m.

Agenda: To review policy and procedures.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 22, 2016, 3:30 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 23, 2016, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 24, 2016, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Robert Wellner, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7015, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 9, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11261 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Centers of Biomedical Research Excellence (COBRE) (P20) Applications.

Date: June 30, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda Downtown, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Shinako Takada, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3An.22, Bethesda, MD 20892–6200, 301–402–9448, *shinako.takada@nih.gov.*

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of COBRE Phase I Applications.

Date: July 13, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel, 5701 Marinelli Road, Bethesda, MD.

Contact Person: Robert Horowits, Scientific Review Officer, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3An.18, Bethesda, MD 20892–6200, 301–594–6904, *horowitr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: May 9, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11262 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK DEM Fellowship Grant Review.

Date: June 5–7, 2016.

Time: 6:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Carol J. Goter-Robinson, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7347, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *goterrobinsonc@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Clinical Trials.

Date: June 7, 2016.

Time: 8:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7351, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–8886, *sanoviche@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Fellowships in Digestive Diseases and Nutrition.

Date: June 8–9, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Thomas A. Tatham, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7021, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–3993, *tathamt@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R01 Telephone SEP.

Date: June 8, 2016.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Xiaodu Guo, Md, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; DDK–C Conflicts.

Date: June 9, 2016.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Thomas A. Tatham, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7021, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–3993, *tathamt@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R13 Conference Grant Applications.

Date: June 23, 2016.

Time: 11:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; RFA–DK–15–506: TEDDY DCC (UC4).

Date: June 24, 2016.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Dianne Camp, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 7013, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–5947682, *campd@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Program Project on Mucosal Immunology and IBD.

Date: July 14, 2016.

Time: 1:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Maria E. Davila-Bloom, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, Room 7017, 6707 Democracy Boulevard, Bethesda, MD 20892, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 9, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11260 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; NIDCR Zika Review.

Date: June 7, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Latarsha J. Carithers, Ph.D., Program Director, Division of Extramural Activities, NIDCR, 6701 Democracy Boulevard, Suite 672, Bethesda, MD 20892, 301–594–4859, *latarsha.carithers@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: May 9, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11259 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request Extension to May 31, 2016 Study To Estimate Radiation Doses and Cancer Risks From Radioactive Fallout From the Trinity Nuclear Test—National Cancer Institute (NCI)

SUMMARY: In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

To Submit Comments and For Further Information: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Steve Simon, Dosimetry Unit Head and Staff Scientist, Radiation Epidemiology Branch, Division of Cancer Epidemiology & Genetics, National Cancer Institute, NIH, 9609 Medical Center Drive, MSC9778, Bethesda, MD 20892–9778 or call non-toll-free number (240)-276–7371 or Email your request, including your address to: *ssimon@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received by May 31, 2016.

Proposed Collection: Study to Estimate Radiation Doses and Cancer Risks from Radioactive Fallout from the Trinity Nuclear Test, 0925–NEW, New, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: This research plan is for a radiation-related cancer risk projection study for the residents of the state of New Mexico (NM) potentially exposed to radioactive fallout from the Trinity nuclear test conducted in 1945. Data will be collected on diet and lifestyle from three groups in NM (non-Hispanic white, Hispanic, and Native American) alive in the 1940s via focus groups and key informant interviews and will be used to derive means and ranges of exposure-related parameters, such as consumption of contaminated foodstuffs, collection and use of water, time spend outdoors, and building materials. These parameter values will be used with historical fallout deposition data in fallout dose assessment models to estimate external and internal radiation doses to typical persons in all counties in New Mexico by ethnicity and age. The estimated doses will be used with literature-derived risk and parameter values on risk/unit dose to project the excess cancers expected (per 1,000 persons within each stratum) including uncertainty on each estimate. Endpoints are leukemia, thyroid cancer, stomach cancer, colon cancer, and all solid cancers combined.

This data collection is needed to accomplish the overall Trinity Study goals, which are to: (1) Estimate external and internal radiation dose to the four primary organs/tissues of interest (thyroid, stomach, colon, and red bone marrow) from primary radionuclides in nuclear testing fallout in each county of New Mexico as a result of the Trinity test, stratified by age, gender, ethnicity, and conditions of exposure (low, medium, high); (2) in each county, estimate the number of excess cancer cases to organs of interest per 1,000 (hypothetical) persons stratified by age, gender, ethnicity, and conditions of exposure (low, medium, high).

The study data will be collected via focus group and individual interview. Between 10 and 15 focus groups with up to 8 participants are planned. These participants will be 70 years old and older, living in New Mexico, who were alive at the time of the Trinity nuclear test and living in any of 19 Native American pueblos/tribes or Hispanic/Latino and non-Hispanic white communities in or near the fallout region in New Mexico. Additionally, up to 30 individual interviews are planned with key informants chosen to represent a variety of experiences and expertise. Individuals who prefer not to take part in a focus group will be interviewed individually as key informants. The investigators will collaborate with community representatives who will recommend potential participants for either the focus groups or interviews.

The objective of the focus groups and interviews is to collect information directly from community members who were alive at the time of the Trinity test, or with direct knowledge of specific life circumstances, cultural patterns, and dietary practices of Native Americans, Hispanics/Latinos, or non-Hispanic whites living in New Mexico at this time. In this study, two interviewers, including one with extensive experience working with tribal communities, will moderate the focus groups and conduct in-depth interviews. Translators and interpreters with experience in the study populations will be presented when needed. Each focus group and interview will be scheduled for no more than two hours and will take place in office settings, community facilities, or municipal facilities.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 395.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Instrument	Number of respondents	Frequency of response	Average time per response (in hours)	Annual burden hours
Individuals	Screener	300	1	10/60	50
	Consent Form	150	1	10/60	25
	Focus Groups	120	1	120/60	240
	Pre-Focus Group Guide	120	1	10/60	20
	Key Informants and Academics Interview	30	1	120/60	60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Instrument	Number of respondents	Frequency of response	Average time per response (in hours)	Annual burden hours
Totals		300	720		395

Dated: May 6, 2016.

Karla Bailey,

Project Clearance Liaison, National Cancer Institute, NIH.

[FR Doc. 2016–11254 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiological Basis of Mental Disorders and Addictions Study Section.

Date: June 2–3, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Boris P Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Collaborative Applications: Behavioral Genetics and Epidemiology.

Date: June 7, 2016.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The St. Regis Washington DC, 923 16th Street NW., Washington, DC 20006.

Contact Person: George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237–2693, *voglergp@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Infectious Diseases, Reproductive Health, Asthma and Pulmonary Conditions, Study Section.

Date: June 9–10, 2016

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Pier 2620 hotel fisherman Wharf, 2620 Jones Street, San Francisco, CA 94108.

Contact Person: Lisa Steele, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 257–2638, *steeleln@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Brain Injury and Neurovascular Pathologies Study Section.

Date: June 9–10, 2016

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Grand Chicago Riverfront, 71 East Wacker Drive, Chicago, IL 60601.

Contact Person: Alexander Yakovlev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301–435–1254, *yakovleva@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–3.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 9, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11255 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Request to Access Parkinson's Disease Related-Biospecimens (X01) Review.

Date: May 19, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Joel Saydoff, Ph.D., Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *joel.saydoff@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, Blueprint Neurotherapeutics Network (BPN): Small Molecule Drug Discovery and Development for Disorders of the Nervous System Review.

Date: June 10, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 240 Pennsylvania Avenue, Washington, DC 20037.

Contact Person: Joel Saydoff, Ph.D., Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *Joel.saydoff@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: May 9, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11263 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request NIDDK Office of Minority Health Research Coordination (OMHRC) Research Training and Mentor Programs Applications

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

To Submit Comments and for Further Information: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Winnie Martinez, Project Officer, 6707 Democracy Blvd., Bethesda MD, 20892 or call non-toll-free number (301) 435–2988 or Email your request, including your address to: *Winnie.Martinez@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Proposed Collection: Office of Minority Health Research Coordination Training and Mentor Programs Applications, 0925—NEW, Existing collection in use without OMB control number, National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), National Institutes of Health (NIH).

Need and Use of Information Collection:

In 2000, the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK) of the National Institutes of Health (NIH) established the Office of Minority Health Research Coordination (OMHRC) to address the burden of diseases and disorders that disproportionately impact the health of minority populations. One of the major goals of the office is to build and sustain a pipeline of researchers from underrepresented populations in the biomedical, behavioral, clinical, and social sciences, with a focus on NIDDK mission areas. The office accomplishes this goal by administering a variety of programs and initiatives to recruit high school through post-doctoral educational level individuals into OMHRC research training and mentor programs: The Short-Term Research Experience for Underrepresented Persons (STEP–UP), the Diversity Summer Research Training Program (DSRTP) for Undergraduate Students, the NIH/NMA Program on Careers in Academic Medicine and the Network of Minority Health Research Investigators (NMRI). Identification of participants to matriculate into the program and initiatives comes from applications and related forms hosted through the NIDDK Web site. The proposed information collection activity is necessary in order to determine the eligibility and quality of potential awardees for traineeship in these programs.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 3,922.

Estimated Annualized Burden Hours

TABLE 1—ESTIMATED ANNUALIZED BURDEN HOURS FOR EACH FORM INCLUDED IN THIS PROJECT

Type of respondent	Estimated number of respondents	Estimated number of responses annually per respondent	Estimated total annual burden hours	Estimated total annual burden hours
Short-Term Research Experience for Underrepresented Persons (STEP–UP)	2,000	1	45/60	1,500
STEP–UP Mentor Training Form (SMTF)	200	1	15/60	50
Reference Recommendation form STEP–UP, DSRTP	6000	1	10/60	1000
Survey—STEP–UP Feedback Form	200	1	30/60	100
Survey—Mentor Feedback Form	200	1	15/60	50
Diversity Summer Research Training Program (DSRTP)	100	1	45/60	75
Survey—DSRTP Feedback Form	20	1	30/60	10
Network of Minority Health Research Investigators (NMRI) Criteria Form	200	1	15/60	50
Survey—NMRI Feedback Form	1000	1	30/60	500
Survey—NMRI Mentor Form	1000	1	30/60	500
NIH/NMA Fellows Program on Careers in Academic Medicine (NIH/NMA)	200	1	20/60	67
Survey—NIH/NMA Feedback Form	40	1	30/60	20

Dated: April 26, 2016.

Priscilla Logan,

NIDDK Project Clearance Liaison, Office of Management Policy Analysis, National Institute of Diabetes and Digestive and Kidney Diseases, NIH.

[FR Doc. 2016–11416 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel.

Date: June 8, 2016.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Democracy Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: M. Lourdes Ponce, Scientific Review Officer, Office of Scientific Review, National Center For Advancing Translational, Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1073, Bethesda, MD 20892, 301–435–0810, *lourdes.ponce@nih.gov.*

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; SBIR Phase II.

Date: June 14, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Democracy Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Sailaja Koduri, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing, Translational Sciences, 6701 Democracy Blvd., Room 1074, Bethesda, MD 20892, 301–435–0813, *Sailaja.koduri@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: May 9, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–11256 Filed 5–12–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Mental Health Services; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services (CMHS) National Advisory Council will meet June 1, 2016, 10:00 a.m. to 12:00 p.m.

The meeting will include discussion and evaluation of grant applications reviewed by Initial Review Groups, an examination of confidential financial, business and personal information concerning the applicants and discussion of grant award proposals. Therefore, the meeting will be closed to the public, as determined by the SAMHSA Administrator, in accordance with title 5 U.S.C. 552b(c)(4) and (6) and (c)(9)(B) and 5 U.S.C. App. 2, section 10(d).

The meeting will be held virtually. Meeting information and a roster of Council members may be obtained either by accessing the SAMHSA Council Web site at: *http://www.samhsa.gov/about-us/advisory-councils/cmhs-national-advisory-council* or by contacting the CMHS National Advisory Council Designated Federal Official, Ms. Deborah DeMasse-Snell (see contact information below).

Committee Name: SAMHSA's Center for Mental Health Services National Advisory Council.

Date/Time/Type: June 1, 2016, 10:00 a.m.–12:00 p.m. CLOSED.

Place: SAMHSA Building, 5600 Fishers Lane, Conference Room 14E56, Rockville, Maryland 20857.

Contact: Deborah DeMasse-Snell, M.A. (Than), Designated Federal Official, SAMHSA CMHS National Advisory Council, 5600 Fishers Lane, Room 14E53C, Rockville, Maryland 20857, Telephone: (240) 276–1861, Fax: (240) 276–1850, Email: *Deborah.DeMasse-Snell@samhsa.hhs.gov.*

Summer King,

Statistician, SAMHSA.

[FR Doc. 2016–11247 Filed 5–12–16; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Mental Health Services; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services (CMHS) National Advisory Council will meet June 21, 11:00 a.m. to 12:00 p.m.

The meeting will include discussion and evaluation of grant applications reviewed by Initial Review Groups, an examination of confidential financial, business and personal information concerning the applicants, and discussion of grant award proposals. Therefore, the meeting will be closed to the public, as determined by the SAMHSA Administrator, in accordance with title 5 U.S.C. 552b(c)(4) and (6) and (c)(9)(B) and 5 U.S.C. App. 2, section 10(d).

The meeting will be held virtually. Meeting information and a roster of Council members may be obtained either by accessing the SAMHSA Council Web site at: *http://www.samhsa.gov/about-us/advisory-councils/cmhs-national-advisory-council* or by contacting Deborah DeMasse-Snell.

Committee Name: SAMHSA's Center for Mental Health Services National Advisory Council.

Date/Time/Type: June 21, 11:00 a.m. to 12:00 p.m. (EDT) CLOSED.

Place: SAMHSA Building, 5600 Fishers Lane, Conference Room 14E56, Rockville, Maryland 20857.

Contact: Deborah DeMasse-Snell, M.A. (Than), Designated Federal Officer, SAMHSA CMHS National Advisory Council, 5600 Fishers Lane, Room 14E53C, Rockville, Maryland 20857 (mail), telephone: (240) 276–1861, fax: (240) 276–1850, email: *Deborah.DeMasse-Snell@samhsa.hhs.gov.*

Summer King,

Statistician, SAMHSA.

[FR Doc. 2016–11248 Filed 5–12–16; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will increase 1 percent from the previous quarter. For the calendar quarter beginning April 1, 2016, the interest rates for overpayments will be 3 percent for corporations and 4 percent for non-corporations, and the interest rate for underpayments will be 4 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: *Effective Date:* April 1, 2016.

FOR FURTHER INFORMATION CONTACT: Michael P. Dean, Revenue Division, Collection and Refunds Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 614–4882.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: one for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2016–06, the IRS determined the rates of interest for the calendar quarter beginning April 1, 2016, and ending on June 30, 2016. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (1%) plus two percentage points (2%) for a total of three percent (3%). For overpayments made by non-corporations, the rate is the Federal short-term rate (1%) plus three percentage points (3%) for a total of four percent (4%). These interest rates are subject to change for the calendar quarter beginning July 1, 2016, and ending September 30, 2016.

For the convenience of the importing public and U.S. Customs and Border Protection personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5

Beginning date	Ending date	Under-payments (percent)	Over-payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	063016	4	4	3

Dated: May 10, 2016.

R. Gil Kerlikowske,

Commissioner.

[FR Doc. 2016–11376 Filed 5–12–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0061]

Agency Information Collection Activities: Application To Establish a Centralized Examination Station

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Application to Establish a Centralized Examination Station. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before June 13, 2016 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of Trade, 90 K Street, NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (81 FR 7365) on February 11, 2016, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Application to Establish a Centralized Examination Station.

OMB Number: 1651–0061.

Abstract: A Customs and Border Protection (CBP) port director decides when his or her port needs one or more Centralized Examination Stations (CES). A CES is a facility where imported merchandise is made available to CBP officers for physical examination. If it is decided that a CES is needed, the port director solicits applications to operate a CES. The information contained in the application will be used to determine the suitability of the applicant's facility; the fairness of fee structure; and the knowledge of cargo handling operations and of CBP procedures. The names of all corporate officers and all employees who will come in contact with uncleared cargo will also be provided so that CBP may perform background investigations. The CES application is provided for by 19 CFR 118.11 and is authorized by 19 U.S.C. 1499, Tariff Act of 1930.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 50.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 100.

Dated: May 9, 2016.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2016–11278 Filed 5–12–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2016–0022]

Homeland Security Advisory Council Meeting

AGENCY: The Office of Partnership and Engagement, DHS.

ACTION: Notice of partially closed Federal Advisory Committee meeting.

SUMMARY: The Homeland Security Advisory Council ("Council") will meet in person on June 2, 2016. Members of the public may participate in person. The meeting will be partially closed to the public.

DATES: The Council will meet Thursday, June 2, 2016, from 10:05 a.m. to 5:15 p.m. EDT. The meeting will be open to the public from 1:50 p.m. to 4:25 p.m. EDT. Please note the meeting may close early if the Council has completed its business. The meeting will be closed to the public from 10:05 a.m. to 11:20 a.m. EDT, 1:00 p.m. to 1:40 p.m. EDT, and 4:30 p.m. to 5:15 p.m. EDT.

ADDRESSES: The meeting will be held at the Woodrow Wilson International Center for Scholars ("Wilson Center"), located at 1300 Pennsylvania Avenue NW., Washington, DC 20004. All visitors will be processed through the lobby of the Wilson Center. Written public comments prior to the meeting must be received by 5:00 p.m. EDT on Monday, May 30, 2016, and must be identified by Docket No. DHS–2016–0022. Written public comments after the meeting must be identified by Docket No. DHS–2016–0022 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: HSAC@hq.dhs.gov.* Include Docket No. DHS–2016–0022 in the subject line of the message.
- *Fax:* (202) 282–9207.
- *Mail:* Homeland Security Advisory Council, Attention Mike Miron, Department of Homeland Security, Mailstop 0445, 245 Murray Lane SW., Washington, DC 20528.

Instructions: All submissions received must include the words "Department of Homeland Security" and "DHS–2016–0022," the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read comments received by the Council, go to *http://www.regulations.gov,* search "DHS–2016–0022," "Open Docket Folder" and access your comments.

FOR FURTHER INFORMATION CONTACT: Mike Miron at *HSAC@hq.dhs.gov* or at (202) 447–3135.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under Sec. 10(a) of the Federal Advisory Committee Act (FACA), Public Law 92–463 (5 U.S.C. appendix), which requires each FACA committee meeting to be open to the public.

The Council provides organizationally independent, strategic, timely, specific, actionable advice, and recommendations to the Secretary of the Department of Homeland Security (DHS) on matters related to homeland security. The Council is comprised of leaders of local law enforcement, first responders, Federal, State, and local government, the private sector, and academia.

The Council will meet in an open session between 1:50 p.m. and 4:25 p.m. EDT. The Council will receive reports and recommendations from the Cybersecurity Subcommittee and the Countering Violent Extremism Subcommittee.

The Council will meet in a closed session from 10:05 a.m. to 11:20 a.m. EDT, 1:00 p.m. to 1:40 p.m. EDT, and 4:30 p.m. to 5:15 p.m. EDT to receive sensitive operational counterterrorism information from senior DHS officials, information on current threats, and a southern border security update.

Basis for Partial Closure: In accordance with Sec. 10(d) of the Federal Advisory Committee Act (FACA), the Secretary of the Department of Homeland Security has determined this meeting requires partial closure. The disclosure of the information relayed would be detrimental to the public interest for the following reasons:

The Council will receive closed session briefings from senior DHS officials. These briefings will concern matters sensitive to homeland security within the meaning of 5 U.S.C. 552b(c)(7)(E) and 552b(c)(9)(B). The Council will receive operational counterterrorism updates on the current threat environment and security measures associated with countering such threats, including those related to aviation security programs, and southwest border security updates. The session is closed under 5 U.S.C. 552b(c)(7)(E) because disclosure of that information could reveal investigative techniques and procedures not generally available to the public, allowing terrorists and those with interests against the United States to circumvent the law and thwart the Department's strategic initiatives. In addition, the session is closed pursuant to 5 U.S.C. 552b(c)(9)(B) because disclosure of these techniques and procedures could frustrate the successful implementation of protective measures designed to keep our country safe.

Participation: Members of the public will have until 5 p.m. EDT on Monday, May 30, 2016, to register to attend the Council meeting on June 2, 2016. Due to limited availability of seating, admittance will be on a first-come first-serve basis. Participants interested in attending the meeting can contact Mike Miron at *HSAC@hq.dhs.gov* or (202) 447–3135. You are required to provide your full legal name, date of birth, and company/agency affiliation. The public may access the facility via public transportation or use the public parking garages located near the Wilson Center. Wilson Center directions can be found at: *http://wilsoncenter.org/directions.* Members of the public will meet at 1:15 p.m. EDT at the Wilson Center's main entrance for sign in and escorting to the meeting room for the public session. Late arrivals after 1:45 p.m. EDT will not be permitted access to the facility.

Facility Access: You are required to present a valid original government-issued ID, to include a State Driver's License or Non-Driver's Identification Card, U.S. Government Common Access Card (CAC), Military Identification Card or Person Identification Verification Card; U.S. Passport, U.S. Border Crossing Card, Permanent Resident Card or Alien Registration Card; or Native American Tribal Document.

Information of Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact Mike Miron at *HSAC@hq.dhs.gov* or (202) 447–3135 as soon as possible.

Dated: May 10, 2016.

Sarah E. Morgenthau,

Executive Director, Homeland Security Advisory Council, DHS.

[FR Doc. 2016–11345 Filed 5–12–16; 8:45 am]

BILLING CODE 9110–9M–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5910–N–07]

60-Day Notice of Proposed Information Collection: Continuum of Care Homeless Assistance—Technical Submission

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* July 12, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone (202) 402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Norm Suchar, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Room 7262, Washington, DC 20410; telephone (202) 708–5015 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in section A.

A. Overview of Information Collection

Title of Information Collection: Continuum of Care Homeless Assistance—Technical Submission.

OMB Approval Number: 2506–0183.

Type of Request: Extension of currently approved collection.

Form Number: HUD–40090–3a, HUD–40090–3b.

Description of the need for the information and proposed use: This submission is to request an extension of a currently approved collection associated with the Technical Submission phase of the Continuum of Care (CoC) Program Application. This submission is limited to the Technical Submission process under the CoC Program interim rule, as authorized by the HEARTH Act. Applicants who are successful in the CoC Program Competition are required to submit more detailed technical information before a grant agreement. The information to be collected will be used to ensure that technical requirements are met prior to the execution of a grant agreement. The technical requirements relate to a more extensive description of the budgets for administration costs, timelines for project implementation, match documentation and other project specific documentation, and information to support the resolution of grant conditions. HUD will use this detailed information to determine if a project is financially feasible and whether all proposed activities are eligible. All information collected is used to carefully consider conditional applicants for funding. If HUD collects less information, or collected it less frequently, the Department could not make a final determination concerning the eligibility of applicants for grant funds and conditional applicants would not be eligible to sign grant agreements and receive funding. To see the regulations for the CoC Program and applicable supplementary documents, visit HUD's Homeless Resource Exchange page at *https://www.hudexchange.info/programs/coc/.* The statutory provisions and the implementing interim rule (also found at 24 CFR part 587) that govern the program require the information provided by the Technical Submission.

Respondents (i.e., affected public): Applicants that are successful in the Continuum of Care Homeless Assistance Grant competition.

Estimated Number of Respondents: 750.

Estimated Number of Responses: 750.

Frequency of Response: 1.

Average Hours per Response: 8.

Total Estimated Burdens: 6,000.

Note: Preparer of this notice may substitute the chart for everything beginning with estimated number of respondents above:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
	750	1	750	8	6,000	21	126,000
Total	750	1	750	8	6,000	21	126,000

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Dated: May 3, 2016.

Harriet Tregoning,

Principal Deputy Assistance Secretary for Community Planning and Development.

[FR Doc. 2016–11354 Filed 5–12–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5931–D–01]

Consolidated Redelegation of Authority for the Government National Mortgage Association (Ginnie Mae)

AGENCY: Office of the President of the Government National Mortgage Association, HUD.

ACTION: Notice of delegation of authority.

SUMMARY: In this Notice, the President of the Government National Mortgage Association (Ginnie Mae) retains authority and redelegates authority granted to Ginnie Mae to the Executive Vice President and other subordinate employees.

DATES: *Effective Date:* May 5, 2016.

FOR FURTHER INFORMATION CONTACT: Office of the Senior Vice President and Chief Risk Officer, Government National Mortgage Association, Department of Housing and Urban Development, Potomac Center South, 550 12th Street SW., 3rd Floor, Washington, DC 20024; telephone number (202) 475–4918. (This is not a toll-free number). Persons with hearing- or speech-impairments may access this number though TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: By a notice published in the **Federal Register** on August 30, 2011 (76 FR 53931), the Secretary issued a consolidated delegation of authority to the President of Ginnie Mae. In that notice, the President of Ginnie Mae was given authority to redelegate the authorities delegated to the President by the Secretary.[1] Part I of this notice contains concurrent redelegations from the President of Ginnie Mae to the Executive Vice President and redelegations from the Executive Vice President to Senior Vice Presidents.[2] Part II of this notice contains redelegations from the Senior Vice Presidents to subordinate staff. Part III of this notice discusses the ability of the Senior Vice Presidents to redelegate the authority redelegated to them from the Executive Vice President and certain non-delegable duties of the Executive Vice President. Part IV of this notice provides that this delegation supersedes all previous redelegations from the President, Executive Vice President and Senior Vice Presidents and authorizes those parties to revoke the authority contained in this delegation.

I. Authority Redelegated

Section A. The President of Ginnie Mae Retains and Redelegates Concurrent Authority to the Executive Vice President

The President of Ginnie Mae hereby retains and redelegates to the Executive Vice President concurrent authority with the President. The Executive Vice President is authorized to perform all duties of the President of Ginnie Mae in place of the President. The Executive Vice President is also authorized to perform the functions delegated by the Secretary to the President of Ginnie Mae, except the authority to waive HUD regulations. The authority to waive regulations is reserved for the President of Ginnie Mae pursuant to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)). If the President is absent from office, the person authorized to act in the President's absence may exercise the waiver authority of the President consistent with HUD's policies and procedures (73 FR 76674 and 66 FR 13944).

Section B. The Executive Vice President of Ginnie Mae Retains and Redelegates Authority to the Senior Vice Presidents

The Executive Vice President of Ginnie Mae hereby retains and redelegates to the Senior Vice Presidents the authority to perform the below enumerated functions.

1. The Senior Vice President of the Office of Enterprise Risk is hereby delegated to handle matters related to Operational, Counterparty, Market and Credit Risk which includes, but is not limited to, the authority:

a. To establish, oversee and maintain all appropriate risk management policies, activities, and controls for Ginnie Mae, including analyzing the risk profile of business units, carrying out risk management and evaluation functions, and performing risk assessments.

b. To approve pool transfers, non-streamlined commitment authority, subservicing arrangements, and acceptance of corporate guaranty.

c. To approve waivers of net worth, liquidity requirements, and errors and omissions fidelity insurance.

d. To negotiate and approve asset dispositions.

2. The Senior Vice President of the Office of Issuer and Portfolio Management is hereby delegated to handle matters related to the Mortgage-Backed Securities (MBS) Program, which includes, but is not limited to, the authority:

a. To oversee the activities and performance of issuers participating in the MBS Program.

b. To determine the manner of issuers' participation in the MBS Program.

c. To approve the ability of institutions to participate as issuers in the MBS Program.

d. To render decisions concerning the compliance of issuers with MBS Program requirements.

e. To make determinations related to the servicing of loans contained in defaulted portfolios.

f. To approve subservicing arrangements and asset disposition.

g. To initiate and impose civil money penalties.

h. To establish and maintain policies and procedures for claims collection and coordinate claims collection activities.

3. The Senior Vice President of the Office of Capital Markets is hereby delegated to handle matters related to the Multiclass Securities Program, which includes, but is not limited to, the authority:

a. To oversee the operation and management of the Multiclass Securities Program.

b. To execute documents necessary to the administration of the Multiclass Securities Program.

c. To execute the Transaction Initiation Letter, Sponsor Agreement, and Guaranty Agreement.

4. The Senior Vice President of the Office of Chief Financial Officer is hereby delegated to handle finance matters related to Ginnie Mae, which includes, but is not limited to, the authority:

a. To develop and maintain a financial management system to administer and coordinate the financial and accounting functions for Ginnie Mae.

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[1] The Ginnie Mae Bylaws separately provide the President of Ginnie Mae with other significant authority. These delegations do not supersede or rescind the authority contained in the Bylaws. The Ginnie Mae Bylaws are available at *http://www.ginniemae.gov/inside_gnma/executive_leadership/Documents/ginniemae_bylaws_april2016.pdf.*

[2] The Ginnie Mae Bylaws authorize Ginnie Mae Vice Presidents to sign all contracts not subject to the Federal Acquisition Regulation, mortgages, pledges, other documents, instruments and other writings that call for Ginnie Mae's execution in the conducting of Ginnie Mae's business. The authority redelegated to the Senior Vice Presidents by the Executive Vice President does not supersede or rescind the authority contained in the Bylaws.

b. To be responsible for the financial management needs of Ginnie Mae, to report to the Congress and to external agencies on financial management performance, Ginnie Mae financial statements, and other information requests required by law and regulation.

c. To establish and maintain policies and procedures for claims collection and coordinate claims collection activities.

d. To appoint Disbursement and Certifying Officers to approve the disbursal of Ginnie Mae funds.

e. To certify funds are available for commitments of contracts.

f. To execute Secure Payment System-Financial Management Services designating individuals as certifying officers.

g. To certify vouchers for payments.

h. To designate, delegate, and revoke authority of designated staff members to use the U.S. Treasury's Secure Payment System.

5. The Senior Vice President of the Office of Securities Operations is hereby delegated to handle matters related to Ginnie Mae Program Operations, which includes, but is not limited to, the authority:

a. To conduct the issuance of single class securities and follow on bond administration functions, *i.e.*, factor reporting, collection of principal and interest payments from issuers, outstanding securities, remaining principle balance corrections, etc.

b. To approve any enhancement to Ginnie Mae's business applications used to administer Ginnie Mae's Mortgage-Backed Securities program.

c. To approve the early termination of a Ginnie Mae pool.

d. To assign mortgages.

6. The Senior Vice President of the Office of Enterprise Data and Technology Solutions is hereby delegated to handle matters related to the information, technology, and security management of all Ginnie Mae systems, which includes, but is not limited to, the authority:

a. To certify and accredit Ginnie Mae business applications;

b. To ensure security of Ginnie Mae business applications;

c. To handle matters related to the procurement of hardware, software, and licensing.

d. To manage Ginnie Mae's infrastructure and security operations.

e. To handle matters of interagency security agreements for data exchange.

7. The Senior Vice President of the Office of Management Operations is hereby delegated to handle matters related to Administrative Management, Procurement, and Communications, which includes, but is not limited to, the authority:

a. To coordinate administrative functions, policies, and programs related to Human Resources management and administration.

b. To provide oversight of contract activities including reviews of quality and internal controls.

c. To direct and coordinate all media outreach for Ginnie Mae.

II. Authority Redelegated to Other Positions Within Ginnie Mae

Section A

The Senior Vice President of Office of Enterprise Risk retains and redelegates the authority to Directors and staff to handle matters related to Operational, Counterparty, Market and Credit Risk:

1. To establish, oversee, and maintain all appropriate risk management policies, activities, and controls for Ginnie Mae, including analyzing the risk profile of business units, carrying out risk management and evaluation functions, and performing risk assessments.

2. To approve new issuer applications.

Section B

The Senior Vice President of the Office of Issuer Portfolio Management hereby retains and redelegates the authority to Directors and staff:

1. To oversee the activities and performance of issuers participating in the MBS Program.

2. To determine the manner of issuers' participation in the MBS Program.

3. To approve the ability of institutions to participate as issuers in the MBS Program.

4. To render decisions concerning the compliance of issuers with MBS Program requirements.

5. To make determinations about the servicing of loans contained in defaulted portfolios.

6. To approve subservicing arrangements and asset disposition.

7. To establish and maintain policies and procedures for claims collection and coordinate claims collection activities.

Section C

The Senior Vice President of the Office of Capital Markets retains and redelegates the authority to the Deputies, Directors, and securities market specialists:

1. To oversee the operation and management of the Multiclass Securities Program.

2. To execute documents necessary to the administration of the Multiclass Securities Program.

3. To execute the Transaction Initiation Letter, Sponsor Agreement, and Guaranty Agreement.

Section D

The Senior Vice President of the Office of Chief Financial Officer retains and redelegates the authority to Directors and specifically designated staff members:

1. To develop and maintain a financial management system to administer and coordinate the financial and accounting functions for Ginnie Mae.

2. To be responsible for the financial management needs of Ginnie Mae, to report to the Congress and to external agencies on financial management performance, Ginnie Mae financial statements, and other information requests required by law and regulation.

3. To establish and maintain policies and procedures for claims collection and coordinate claims collection activities.

4. To certify on funds available for commitments of contracts.

5. To certify vouchers for payments.

6. To execute Secure Payment System-Financial Management Services.

Section E

The Senior Vice President of Office of Securities Operations retains and redelegates the authority to directors and staff:

1. To conduct the issuance of single class securities and follow on bond administration functions, *i.e.*, factor reporting, collection of principal and interest payments from issuers to investors, payments to investors, disclosures on outstanding securities.

2. To approve any enhancements to Ginnie Mae business applications used to administer Ginnie Mae's MBS program.

3. To approve the early termination of a Ginnie Mae pool.

4. To assign mortgages.

Section F

The Senior Vice President of Office of Enterprise Data and Technology Solutions retains and redelegates the authority to Directors and staff:

1. To certify and accredit Ginnie Mae business applications.

2. To ensure security of Ginnie Mae business applications.

3. To handle matters related to the procurement of hardware, software, and licensing.

4. To manage Ginnie Mae's infrastructure and security operations.

5. To handle matters of interagency security agreements for data exchange.

Section G

The Senior Vice President of the Office of Management Operations retains and redelegates the authority to the Directors and staff:

1. To coordinate Ginnie Mae's administrative functions, policies, and programs related to Human Resources management and administration.
2. To provide oversight of contract activities including reviews of quality and internal controls.
3. To direct and coordinate all media outreach for Ginnie Mae.

III. Authority To Redelegate

Certain authority redelegated by the President of Ginnie Mae to the Executive Vice President and Senior Vice Presidents in this notice is non-delegable. The non-delegable authorities include, but are not limited to: (1) Authority to issue All Participants Memoranda; (2) Authority to approve the reservation of funds request; and (3) Authority to approve the request for contract services for all contract work. Duties that are delegable have been redelegated by the Senior Vice Presidents in Part II Sections A–G above. Duties that are non-delegable are retained by the President, Executive Vice President, and Senior Vice Presidents.

IV. Authority Superseded

This redelegation of authority supersedes all previous redelegations of authority from the President, Executive Vice President and Senior Vice Presidents of Ginnie Mae. The President, Executive Vice President and Senior Vice Presidents of Ginnie Mae may revoke the authority authorized herein, in whole or part, at any time.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Section 3.05, Bylaws of the Government National Mortgage Association, Ginnie Mae.gov. 24 CFR part 310.

Dated: May 5, 2016.

Theodore W. Tozer,

President, Government National Mortgage Association.

[FR Doc. 2016–11358 Filed 5–12–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5907–N–20]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to: Ms. Theresa M. Ritta, Chief Real Property Branch, the Department of Health and Human Services, Room 5B–17, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–2265 (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.,* acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AGRICULTURE: Ms. Debra Kerr, Department of Agriculture, Reporters Building, 300 7th Street SW., Room 300, Washington, DC 20024, (202) 720–8873; AIR FORCE: Mr. Robert E. Moriarty, P.E., AFCEC/CI, 2261 Hughes Avenue, Ste. 155, JBSA Lackland, TX 78236–9853; ARMY: Ms. Veronica Rines, Office of the Assistant Chief of Staff for Installation Management, Department of Army, Room 5A128, 600 Army Pentagon, Washington, DC 20310, (571) 256–8145; ENERGY: Mr. David Steinau, Department of Energy, Office of Property Management, OECM MA–50, 4B122, 1000 Independence Ave. SW., Washington, DC 20585, (202) 287–1503; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202) 501–0084; INTERIOR: Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, 3960 N. 56th Ave. #104, Hollywood, FL 33021; (443) 223–4639; NASA: Mr. Frank T. Bellinger, Facilities Engineering Division, National Aeronautics & Space Administration, Code JX, Washington, DC 20546, (202) 358–1124; NAVY: Mr. Steve Matteo, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202) 685–9426; (These are not toll-free numbers).

Dated: May 5, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 05/13/2016

Suitable/Available Properties

Building

California

14 Buildings
Naval Base Ventura County
Point Mugu CA 93043
Landholding Agency: Navy
Property Number: 77201620013
Status: Unutilized
Directions: Building 217SNI; 115SNI; 116SNI; 207SNI; 74SNI; 146SNI; 68SNI; 302SNI; 121SNI; 19SNI; 2SNI; 214A; 228SNI; 116A
Comments: public access denied and no alternative method to gain access without compromising national security.

Idaho

Doublewide Trailer #6, Challis
221 South US Highway 93
Challis ID 83226
Landholding Agency: Agriculture
Property Number: 15201620020
Status: Excess
Directions: 2T1156, RPUID B1084.002901
Comments: off-site removal only; 49+ yrs. old; 1,140 sq. ft.; housing; contact Agriculture for more information.

Kentucky

Stearns Residence #3 (128)
248 Ranger Station Road
Whitley City KY 42653
Landholding Agency: Agriculture
Property Number: 15201620018
Status: Unutilized
Directions: off-site removal only; removal extremely difficult; no future agency need
Comments: 41+ yrs. old; 2,566 sq. ft.; residential; 6+ mos. vacant; good condition; $2,500 in repairs needed; contact Agriculture for more information.

Pine Knot Job Corps Residence #2 (131)
132 Job Corps Road
Pine Knot KY 42635
Landholding Agency: Agriculture
Property Number: 15201620019
Status: Unutilized
Comments: off-site removal only no future agency use 40+ yrs. old; 1,300 sq. ft.; residential; 6+ mos. vacant; poor condition; contact Agriculture for more information.

Stearns Residence #2 (106)
201 Ranger Station Road
Whitley City KY 42653
Landholding Agency: Agriculture
Property Number: 15201620021
Status: Unutilized
Comments: off-site removal only no future agency use 50+ yrs. old; 1,367 sq. ft.; residential; 6+ mos. vacant; poor condition; $50,000 repairs needed; contact Agriculture for more information.

Pine Knot Job Corps Residence #1 (130)
132 Job Corps Road
Pine Knot KY 42635
Landholding Agency: Agriculture
Property Number: 15201620022
Status: Unutilized
Comments: off-site removal only no future agency use 41+ yrs. old, 1,300 sq. ft.; residential; 6+ mos. vacant; poor condition; contact Agriculture for more information.

Pine Knot Job Corps Residence #3 (132)
132 Job Corps Road
Pine Knot KY 42635
Landholding Agency: Agriculture
Property Number: 15201620023
Status: Unutilized
Comments: off-site removal only no future agency use; 39+ yrs. old; 1,300 sq. ft.; residential; 6+ mos. vacant; poor condition; contact Agriculture for more information.

Stonewall Residence (522)
870 Stonewall Road
Monticello KY
Landholding Agency: Agriculture
Property Number: 15201620024
Status: Unutilized
Comments: off-site removal only no future agency use; 40+ yrs. old; 800 sq. ft.; residential; 6+ mos. vacant; poor condition; contact Agriculture for more information.

Stearns Residence #1 (107)
142 Ranger Station Road
Whitley City KY 42653
Landholding Agency: Agriculture
Property Number: 15201620025
Status: Unutilized
Comments: off-site removal only; no future agency use: 75+ yrs. old; 1,332 sq. ft.; residential; 6+ mos. vacant; fair condition; contact Agriculture

North Carolina

3 Buildings
OLF NAS Oceana
Plymouth NC
Landholding Agency: GSA
Property Number: 54201620006
Status: Surplus
GSA Number: 4–D–NC–0831–AG
Directions: Landholding Agency: Navy; Disposal Agency: GSA 4–D–NC–0831–AG (013); 4–D–NC–0831–AC (004); 4–D–NC–0831–AD (007); 4–D–NC–0831–AE (007A).
Comments: 26+ yrs. old; storage; 120+ mos. vacant; good condition; contact GSA for more information.

Texas

Austin U.S. Courthouse
200 W. 8th Street
Austin TX 78701
Landholding Agency: GSA
Property Number: 54201620010
Status: Excess
GSA Number: 7–G–TX–1170–AA
Comments: 63,264 sq. ft.; sits on 0.81 fee acres; on National Register of Historic Places; contact GSA for more information.

Utah

Timpanogos Cave National Monument
2038 Alpine Loop Road
American Fork UT 84003
Landholding Agency: Interior
Property Number: 61201620004
Status: Excess
Comments: off-site removal only; 25+ yrs. old; 2,343 sq. ft.; 2+ mos. vacant; poor condition; maybe difficult to move; contact Interior for more information.

Virginia

2799 Harrison Loop
JBLE Ft. Eustis
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620011
Status: Unutilized
Comments: off-site removal only; no future agency need; Admin.; 5,700 sq. ft.; extreme. difficult to remove; very poor conditions; lead; contact Air Force for more info.

2785 Harrison Loop
JBLE Ft. Eustis
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620012
Status: Unutilized
Comments: off-site removal only; no future agency need; 7,715 sq. ft.; extreme. difficult to remove; Admin. very poor conditions; contact Air Force for more info.

811 Gaffy Place
JBLE Ft. Eustis
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620013
Status: Unutilized
Comments: off-site removal only; no future agency need; extreme. difficult to remove; 40,166 sq. ft.; barracks; very poor conditions; contact Air Force for more info.

652 Williamson Loop
JBLE Ft. Eustis
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620014
Status: Unutilized
Comments: off-site removal only; no future agency need; extreme. difficult remove; 3,214 sq. ft.; storage; very poor conditions; contact Air Force for more info.

2749 Taylor Ave.

JBLE Ft. Eustis
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620015
Status: Unutilized
Comments: off-site removal only; no future agency need; 100 sq. ft.; storage; very poor conditions; contact Air Force for more info.

3511 Mulberry Island Rd.
null
Ft. Eustis VA 23604
Landholding Agency: Air Force
Property Number: 18201620016
Status: Unutilized
Comments: off-site removal only; no future agency need; 437 sq. ft.; 2+ months vacant; very poor conditions; contact Air Force for more info.

822 Lee Blvd.
null
Ft. Eustis VA 23604
Landholding Agency: Air Force
Property Number: 18201620017
Status: Unutilized
Comments: off-site removal only; no future agency need; 205 sq. ft.; Heat Plant; 7+ months vacant; very poor conditions; contact Air Force for more info.

876 Lee Blvd.
JBLE
Ft. Eustis VA 23604
Landholding Agency: Air Force
Property Number: 18201620018
Status: Unutilized
Comments: off-site removal only; no future agency need; 651 sq. ft.; office; very poor conditions; contact Air Force for more info.

2703 Marshall St.
Ft. Eustis VA 23604
Landholding Agency: Air Force
Property Number: 18201620019
Status: Unutilized
Comments: off-site removal only; no future agency need; difficult to remove; 1,200 sq. ft.; storage; very poor conditions; contact Air Force for more info.

3913 Mulberry Island Rd.
Ft. Eustis VA 23604
Landholding Agency: Air Force
Property Number: 18201620020
Status: Unutilized
Comments: off-site removal only; no future agency need; 767 sq. ft.; very poor conditions; contact Air Force for more info.

2794 Harrison Loop
JBLE
Ft. Eustis VA
Landholding Agency: Air Force
Property Number: 18201620022
Status: Unutilized
Comments: off-site removal only; no future agency need extreme. difficult to remove; 6,782 sq. ft.; Admin.; very poor conditions; contact Air Force for more info.

2 Buildings
Richmond National Battlefield
Mechanicsville VA 23111
Landholding Agency: Interior
Property Number: 61201620001
Status: Excess
Directions: Tract 01–259 Owens House (1,302 sq. ft.) & Tract 01–135 Foss House (1,928 sq. ft.)
Comments: off-site removal only; 43+—44+ yrs. old; residential; 15+—27+ mos. vacant; fair condition; does not meet health, safety & fire codes; maybe difficult to move; contact Interior for more information.

Thornton Gap Waste Eater Treat
210 Thornton Gap Waste Water Treatment Road
Luray VA 22835
Landholding Agency: Interior
Property Number: 61201620002
Status: Excess
Comments: off-site removal only; 40+ yrs. old; 2,742 sq. ft.; waste water treatment facility; 80+ mos. vacant; poor condition; contact Interior for more information.

Loft Mountain Picnic Area Comf
79450 Skyline Dr. to Loft Mountain Access Rd.
RT 76
Crozet VA 22932
Landholding Agency: Interior
Property Number: 61201620003
Status: Excess
Comments: off-site removal only; 53+ yrs. old; 372 sq. ft.; restroom; 102+ mos. vacant; poor condition; contact Interior for more information.

Ellwood Garage
36380 Constitution Hwy.
Locust Grove VA 22960
Landholding Agency: Interior
Property Number: 61201620009
Status: Excess
Comments: off-site removal only; 51+ yrs. old; 550 sq. ft.; storage; 2+ mos. vacant; fair condition; contact Interior for more information.

2 Buildings
150 & 162 Meadows Office Rd.
Stanley VA 22851
Landholding Agency: Interior
Property Number: 61201620010
Status: Excess
Directions: Big Meadows Employee Apartment Bldg. BM07–25; Big Meadows Office (former apartments) Bldg. BM07–26
Comments: off-site removal only; 2,313 sq. ft. each; removal difficult due to size/type; poor conditions; asbestos/lead; contact Interior for more information.

Washington

Royal Quonset Hut Storage
11522 1st Ave. SE
Othello WA 99344
Landholding Agency: Interior
Property Number: 61201620007
Status: Excess
Directions: RPUID: R0222142300B
Comments: off-site removal only; 63+ yrs. old; 850 sq. ft.; storage; poor condition; contact Interior for more information.

Suitable/Available Properties

Land

North Carolina

1951.24 Acres of Land
OLF NAS Oceana
Plymouth NC
Landholding Agency: GSA
Property Number: 54201620008
Status: Surplus
GSA Number: 4–D–NC–0831–AA
Directions: Landholding Agency: Navy; Disposal Agency: GSA GSA # 4–D–NC–0831–AH (025); 4–D–NC–0831–AA (002); 4–D–NC–0831–AB (003); 4–D–NC–0831–AF (010); 4–D–NC–0831–AA (Parcel 002)
Comments: 1951.24 acres land; agricultural; license for agriculture use expires 03/31/17 with the Government retaining termination rights upon providing licensee 60-day notice.

Tennessee

Self-Sufficiency Parcel 13
Anderson County
Oak Ridge TN 37830
Landholding Agency: GSA
Property Number: 54201620005
Status: Surplus
GSA Number: 4–B–TN–0664–AH
Directions: Landholding Agency: Energy; Disposal Agency: GSA
Comments: 20 acres; 2 sinkholes with eroded wet weather conveyance draining to them; contact GSA for more information.

Unsuitable Properties

Building

California

2 Buildings
PO Box 273, MS 4811
Edwards CA 93523
Landholding Agency: NASA
Property Number: 71201620006
Status: Excess
Directions: Building 4875B & 4875A
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

8 Buildings
PO Box 273, MS 4811
Edwards CA 93523
Landholding Agency: NASA
Property Number: 71201620007
Status: Underutilized
Directions: Building 4807; 4806; 4808; 4850; 4803; 4809; 4805; T–20
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

2 Buildings
PO Box 273, MS 4811
Edwards CA 93523
Landholding Agency: NASA
Property Number: 71201620009
Status: Unutilized
Directions: Building 4985 & 4990
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

4 Buildings
Naval Base Ventura County
Point Mugu CA 93043
Landholding Agency: Navy
Property Number: 77201620010
Status: Unutilized
Directions: Building PM208; PM210; PM11; PM215
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Building 809SNI
311 Main Street
Point Mugu CA 93043
Landholding Agency: Navy

Property Number: 77201620011
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Florida

Tillie Fowler Admin. & Ground
200 Norman Street
Jacksonville FL 32212
Landholding Agency: Navy
Property Number: 77201620012
Status: Unutilized
Directions: 1906TK & 1906A
Comments: public access denied and no alternative method to gain access w/ compromising national security; property located w/airport runway clear zone or military airfield.
Reasons: Secured Area

Building 2277
US Naval Hospital Complex/Corry Station
US Naval Hospital Com FL 32508
Landholding Agency: Navy
Property Number: 77201620015
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security; property located within floodway, which has not been correct or contained.
Reasons: Floodway; Secured Area

Georgia

Savannah HHIAP
Fac. 1907 & 1917 XDQU
1401 Robert B. Miller Dr.
Garden City GA
Landholding Agency: Air Force
Property Number: 18201620010
Status: Underutilized
Comments: public access denied and no alternative without compromising national security.
Reasons: Secured Area

5 Buildings
Cumberland Island National Seashore
St. Mary's GA 31558
Landholding Agency: Interior
Property Number: 61201620008
Status: Excess
Directions: Jenkins #1; #2; #3, Nancy's Fancy; Toonahowie
Comments: all properties are located on Cumberland Island, which is not connected to the mainland by road or bridge and only accessible by boat.
Reasons: Isolated area

Indiana

Bldg. 31
181 IW; 8001 Reinoehl Rd.
Terre Haute IN 47803
Landholding Agency: Air Force
Property Number: 18201620009
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Kansas

123 RPUID: 586630
Ft. Leavenworth
Ft. Leavenworth KS 66027
Landholding Agency: Army
Property Number: 21201620019
Status: Unutilized
Comments: documented deficiencies: structurally unsound; holes in roof that has resulted in significant water damage to interior; clear threat to physical safety.
Reasons: Extensive deterioration

Mississippi

Bldg. 4302 Test Complex Shop Facility
Stennis Space Center
Hancock County MS 39529
Landholding Agency: NASA
Property Number: 71201620010
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Bldg. 4301 Test Complex
Office Facility
Stennis Space Center
Hancock County MS 39529
Landholding Agency: NASA
Property Number: 71201620011
Status: Unutilized
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Nevada

4 Buildings
Sandia National Laboratories
Tonopah NV 89049
Landholding Agency: Energy
Property Number: 41201620003
Status: Excess
Directions: Buildings 09–50; 09–51; 09–60; 09–54.
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

New Mexico

4 Buildings
Bandelier National Monument
Los Alamos NM 87544
Landholding Agency: Interior
Property Number: 61201620005
Status: Excess
Directions: Building MH129; MH127; MH128; MH126.
Comments: can only be entered wearing tyvek suits & respirator for possible Hanta Virus contaminants.
Reasons: Contamination

Ohio

RPUID #524102
(Traffic Chk Hse Bldg. 108)
Springfield Beckley Air National Guard
Springfield OH 45502
Landholding Agency: Air Force
Property Number: 18201620008
Status: Unutilized
Directions: 1337 West Blee Rd.
Comments: public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Pennsylvania

2 Buildings
Gettysburg National Military Park
Gettysburg PA 17325
Landholding Agency: Interior
Property Number: 61201620006
Status: Excess
Directions: Tract 08–103 & Tract 02–107.
Comments: documented deficiencies: foundation support posts in the basement are rotted off at the base & no longer can support the floors; walls shifting; numerous structural issues; rotten roof.
Reasons: Extensive deterioration

South Carolina

13 Buildings
MCRD Parris Island
MCRD Parris Island SC
Landholding Agency: Navy
Property Number: 77201620014
Status: Excess
Directions: Building 293; 765, 1012, 1013, 4030, 5101, 5102, 5103, 5104, 6201, 6202, 6203, 6204
Comments: public access denied and no alternative method to gain access without compromising national security; property located within floodway which has not been correct or contained.
Reasons: Secured Area

Virginia

4 Buildings
9713 Plank Rd.
Spotsylvania VA 22553
Landholding Agency: Interior
Property Number: 61201620011
Status: Excess
Directions: Tract #03–178 Verna House; Verna Chicken Coop; Verna Storage Bldg.; Verna Barn
Comments: bldgs. are structural unsound; significant overgrowth of vegetation; severe cracks in structures; removal will result in collapse; clear threat to physical safety.
Reasons: Extensive deterioration

[FR Doc. 2016–11046 Filed 5–12–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5931–D–02]

Order of Succession for Government National Mortgage Association (Ginnie Mae)

AGENCY: Office of the President of the Government National Mortgage Association, HUD.

ACTION: Notice of order of succession.

SUMMARY: In this Notice, the President of the Government National Mortgage Association (Ginnie Mae) designates the Order of Succession for Ginnie Mae. This Order of Succession supersedes all prior Orders of Succession for Ginnie Mae.

DATES: *Effective Date:* May 5, 2016.

FOR FURTHER INFORMATION CONTACT: Office of the Senior Vice President and Chief Risk Officer, Government National Mortgage Association, Department of Housing and Urban Development, Potomac Center South, 550 12th Street

SW., 3rd Floor, Washington, DC 20024; telephone number (202) 475–4918. (This is not a toll-free number). Persons with hearing- or speech-impairments may access this number though TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The President of the Ginnie Mae hereby issues this Order of Succession pursuant to the Bylaws of Ginnie Mae which authorizes the President of Ginnie Mae to designate the sequence in which other officers of Ginnie Mae shall act. The officers designated below shall perform the duties and exercise the power and authority of the President, when the President is absent or unable to act, or when there is a vacancy in the Office of the President of Ginnie Mae. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d) and the Bylaws of the Government National Mortgage Association, as published at *www.ginniemae.gov.* Accordingly, the President of Ginnie Mae designates the following Order of Succession:

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998 and the Bylaws of Ginnie Mae, during any period when, by reason of absence, disability, or vacancy in office, the President of Ginnie Mae is not available to exercise the powers or perform the duties of the President, the following officials within Ginnie Mae are hereby designated to exercise the powers and perform the duties of the Office:

(1) Executive Vice President;

(2) Senior Vice President, Office of Enterprise Risk;

(3) Senior Vice President, Office of Issuer and Portfolio Management;

(4) Senior Vice President, Office of Capital Markets;

(5) Senior Vice President, Office of Securities Operations;

(6) Senior Vice President, Office of Chief Financial Officer;

(7) Senior Vice President, Office of Enterprise Data and Technology Solutions;

(8) Senior Vice President, Office of Management Operations.

These officials shall perform the functions and duties of the Office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Superseded

This Order of Succession supersedes the prior Orders of Succession for the President of Ginnie Mae.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Section 3.05, Bylaws of the Government National Mortgage Association, as published in the Bylaws published at *www.ginniemae.gov.*

Date: May 5, 2016.

Theodore W. Tozer,

President, Government National Mortgage Association.

[FR Doc. 2016–11359 Filed 5–12–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2016–0068; FXIA16710900000–156–FF09A320000]

Endangered Species; Marine Mammals; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) prohibit activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before June 13, 2016. We must receive requests for marine mammal permit public hearings, in writing, at the address shown in the **ADDRESSES** section by June 13, 2016.

ADDRESSES: *Submitting Comments:* You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–IA–2016–0068.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2016–0068; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

When submitting comments, please indicate the name of the applicant and the PRT# you are commenting on. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information). *Viewing Comments:* Comments and materials we receive will be available for public inspection on *http://www.regulations.gov,* or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service, Division of Management Authority, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2095.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2281 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), along with Executive Order 13576, "Delivering an Efficient, Effective, and Accountable Government," and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

III. Permit Applications

A. Endangered Species

Applicant: Denver Zoological Foundation, Denver, CO; PRT–91925B

The applicant requests a permit to import one male captive born Siberian tiger (*Panthera tigris altaica*) for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Zoological Society of Cincinnati, Cincinnati, OH; PRT–120130

The applicant requests a re-issuance of their permit for the interstate commerce of one male and two female captive-born cheetahs (*Acinonyx jubatus*) for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Saint Louis Zoo, Saint Louis, MO; PRT–93344B

The applicant requests a permit to export three male banteng (*Bos javanicus*) for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Nathan Somero, New Ipswich, NH; PRT–90814B

The applicant requests a permit to import a sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

B. Endangered Marine Mammals and Marine Mammals

Applicant: Silverback Films, Bristol, England, UK; PRT–92150B

The applicant requests a permit to photograph southern sea otters (*Enhydra lutris nereis*) by boat and underwater in California for commercial purposes. This notification covers activities to be conducted by the applicant for less than a 2-year period.

Applicant: Texas A&M University, Galveston, TX; PRT–84799B

The applicant requests a permit to study northern sea otters (*Enhydra lutris kenyoni*) in Alaska for scientific research purposes. This notification covers activities to be conducted by the applicant over a 5-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above applications to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2016–11307 Filed 5–12–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–ES–2016–N036; FF07CAMM00–FX–FXFR133707REG04]

Marine Mammals; Incidental Take During Specified Activities; Proposed Incidental Harassment Authorization for Northern Sea Otters From the Southcentral Stock in Cook Inlet, Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application and proposed incidental harassment authorization; availability of draft environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in response to a request under the Marine Mammal Protection Act of 1972 (MMPA), as amended, from BlueCrest Alaska Operating LLC (BlueCrest), propose to authorize the incidental taking by harassment of small numbers of northern sea otters from the Southcentral stock in Cook Inlet, Alaska, from date of issuance—October 31, 2016. BlueCrest has requested this authorization for their planned oil and gas exploration activities. We anticipate no take by injury or death and include none in this proposed authorization, which would be for take by harassment only.

DATES: We will consider comments we receive on or before June 13, 2016.

ADDRESSES:

Document availability: The incidental harassment authorization request, associated draft environmental assessment, and supporting documentation, such as Literature Cited, are available for viewing at *http://www.fws.gov/alaska/fisheries/mmm/iha.htm.*

Comments submission: You may submit comments on the proposed incidental harassment authorization and associated draft environmental assessment by one of the following methods:

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Kimberly Klein, U.S. Fish and Wildlife Service, MS 341, 1011 East Tudor Road, Anchorage, AK 99503;
- *Fax:* 907–786–3816, attention to Kimberly Klein; or
- *Email comments to: FW7_AK_Marine_Mammals@fws.gov.*

Please indicate to which document, the proposed incidental harassment authorization, or the draft environmental assessment, your comments apply. We will post all hardcopy comments on *http://www.fws.gov/alaska/fisheries/mmm/iha.htm.*

FOR FURTHER INFORMATION CONTACT: To request copies of the application, the list of references used in the notice, and other supporting materials, contact Kimberly Klein, by mail at Marine Mammals Management, U.S. Fish and Wildlife Service, MS 341, 1011 East Tudor Road, Anchorage, AK 99503; by email at *kimberly_klein@fws.gov;* or by telephone at 1–800–362–5148.

SUPPLEMENTARY INFORMATION: In response to a request under section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972 (MMPA), as amended, from BlueCrest, we propose to authorize the incidental taking by harassment of small numbers of northern sea otters from the Southcentral stock in Cook Inlet, Alaska, from date of issuance—October 31, 2016. BlueCrest has requested this authorization for their planned oil and gas exploration activities. We anticipate no take by injury or death and include none in this proposed authorization, which would be for take by harassment only.

Executive Summary

Why We Need To Publish an Incidental Harassment Authorization

In November 2015, the Service was petitioned by BlueCrest to provide authorization for the incidental take by harassment of northern sea otters (*Enhydra lutris kenyoni*) under the MMPA. This proposed authorization is an official document that announces and explains the Service's draft determination to issue an authorization and our plans to address any potential impacts of BlueCrest's plans to conduct an oil and gas production drilling program in lower Cook Inlet on State of Alaska Oil and Gas Lease 384403 under the program name of Cosmopolitan State during the open water season of 2016. The proposed authorization discusses the incidental taking by harassment of small numbers of northern sea otters from the Southcentral stock in Cook Inlet, Alaska, from date of issuance—October 31, 2016.

The Effect of This Authorization

The MMPA allows, upon request, the incidental take of small numbers of marine mammals as part of a specified activity within a specified geographic region. In this case, the activity is related to oil and gas development. As part of this authorization, the Service may authorize incidental take to BlueCrest if we find that the taking would:

- Be of small numbers;
- Have no more than a "negligible impact" on northern sea otters; and
- Not have an "unmitigable adverse impact" on the availability of the species or stock for "subsistence" uses.

The Service may stipulate the permissible methods of taking and require mitigation, monitoring, and reporting of such takings, which are meant to reduce or minimize negative impacts to the northern sea otters.

Request for Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed authorization. We particularly seek comments concerning:

(1) Will the proposed authorization including the proposed activities have a negligible impact on the Southcentral stock of the northern sea otter?

(2) Will the proposed authorization ensure that an unmitigable adverse impact on the availability of northern sea otters for subsistence taking does not occur? and,

(3) Are there any additional provisions we may wish to consider to ensure the conservation of the Southcentral stock of the northern sea otter?

You may submit your comments and materials concerning this proposed authorization by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax, or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *FW7_AK_Marine_Mammals@fws.gov,* your entire comment— including any personal identifying information—may be available to the public. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.fws.gov/alaska/fisheries/mmm/iha.htm.*

Background

Section 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371(a)(5)(D)), authorizes the Secretary of the Interior to allow, upon request of a citizen, for periods of not more than 1 year and subject to such conditions as the Secretary may specify, the incidental but not intentional taking by harassment of small numbers of marine mammals of a species or population stock, by such citizens, while engaging in that activity within that region if the Secretary finds that such harassment during each period concerned:

(1) Will have a negligible impact on such species or stock, and

(2) Will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence.

As part of the authorization process, we prescribe permissible methods of taking, and other means of effecting the least practicable impact on the species or stock and its habitat, and requirements pertaining to the monitoring and reporting of such takings.

The term "take," as defined by the MMPA, means to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal. Harassment, as defined by the MMPA, means "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (the MMPA calls this Level A harassment), or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (the MMPA calls this Level B harassment)."

The terms "small numbers," "negligible impact," and "unmitigable adverse impact" are defined in 50 CFR 18.27, the Service's regulations governing take of small numbers of marine mammals incidental to specified activities. "Small numbers" is defined as "a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock." However, we do not rely on that definition here, as it conflates the terms "small numbers" and "negligible impact," which we recognize as two separate and distinct requirements. Instead, in our small numbers determination, we evaluate whether the number of marine mammals likely to be taken is small relative to the size of the overall population. "Negligible impact" is defined as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." "Unmitigable adverse impact" is defined as "an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met."

Section 101(a)(5)(D) of the MMPA establishes an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals where the take will be limited to harassment. Section 101(a)(5)(D)(iii) establishes a 45-day time limit for Service review of an application, followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, we must either issue or deny issuance of the authorization. We refer to these authorizations as IHAs.

The Service has issued IHAs for sea otters in the past, including the following:

Northern sea otters: IHAs incidental to airport construction on Akun Island and hovercraft operation between Akun Island and Akutan, Alaska (August 27, 2008 (73 FR 50634); June 8, 2010 (75 FR 32497); and April 1, 2011 (76 FR 18232)); and an IHA to cover the incidental take of northern sea otters due to previous oil and gas exploration activities in Cook Inlet, Alaska (August 29, 2014 (79 FR 51584)). None of these IHAs remain in effect.

Southern sea otters (*E.l. nereis*): IHAs incidental to construction activities associated with a tidal wetlands restoration project on the Elkhorn Slough National Estuarine Research Reserve in Monterey County, California (July 20, 2010 (75 FR 42121)), and incidental to the replacement of pier piles and the potable water line at U.S. Coast Guard Station Monterey in Monterey County, California (September 30, 2014 (79 FR 58796)).

Summary of Request

On November 12, 2015, the Service received a request from BlueCrest for the nonlethal taking, by harassment, of northern sea otters (hereafter "otters") from the Southcentral stock incidental to plans to conduct an oil and gas production drilling program in lower Cook Inlet on State of Alaska Oil and Gas Lease 384403 under the program name of Cosmopolitan State. The program includes drilling up to three wells with the total operation time of about 135 days. The exact timing of the project will be dependent upon rig availability, but will occur in the summer operating season between April 15 and October 31, 2016.

In 2013, BlueCrest conducted exploratory oil and gas drilling at a well site in the lower Cook Inlet. Beginning in spring 2016, BlueCrest proposes to drill two more wells to tap these identified gas layers for production and a third well to collect geological information. The proposed BlueCrest drilling operations could harass local sea otters via its impulsive acoustics from the periods of conductor pipe driving (CPD) and vertical seismic profiling (VSP) activities. Harassment is a form of take as defined under the MMPA.

BlueCrest is requesting incidental take authorization for Level B noise harassment (noise exceeding 160 decibels (dB, all dB levels given herein are re: 1 μPa RMS) associated with the oil and gas drilling activities. Actual Level B "takes" will depend upon the number of sea otters occurring within the 160 dB zone of influence (ZOI) at the time of seismic activity. BlueCrest does not believe any Level A injury "takes" (noise exceeding 190 dB) are expected with proposed mitigation measures in place.

A complete copy of BlueCrest's request and supporting documents may be obtained as specified above in **ADDRESSES**.

Prior to issuing an IHA in response to this request, the Service must evaluate the level of industrial activities described in the application, their associated potential impacts to sea otters, and their potential effects on the availability of this species for subsistence use. The information provided by the applicant indicates that oil and gas activities projected over the next year will encompass offshore exploration activities. The Service is tasked with analyzing the impact that lawful industrial activities will have on sea otters during normal operating procedures.

Description of the Specified Activities

In 2013, BlueCrest, then in partnership with Buccaneer Energy, conducted exploratory oil and gas drilling at the Cosmopolitan State #A–1 well site (then called Cosmopolitan State #1). The well encountered multiple oil and gas zones, including gas zones capable of production in paying quantities. Beginning in spring 2016, BlueCrest proposes to drill two more wells (Cosmopolitan State #A–2 and #A–3) to tap these identified gas layers for production. These directionally drilled wells have top holes located a few meters from the original Cosmopolitan State #A–1, and together could feed to a future single offshore platform. Both #A–2 and #A–3 may involve test drilling into oil layers. A third well, #B–1, will be located approximately 1.7 kilometer (km) (1 mile (mi)) southeast of the other three wells. This well will be drilled into oil formations to collect geological information. After testing, the oil horizons will be plugged and abandoned, while the gas zones will be suspended pending platform construction. Refer to Table 1 and Figure 1 for further location details.

TABLE 1—LOCATIONS OF PROPOSED COSMOPOLITAN STATE WELL SITES

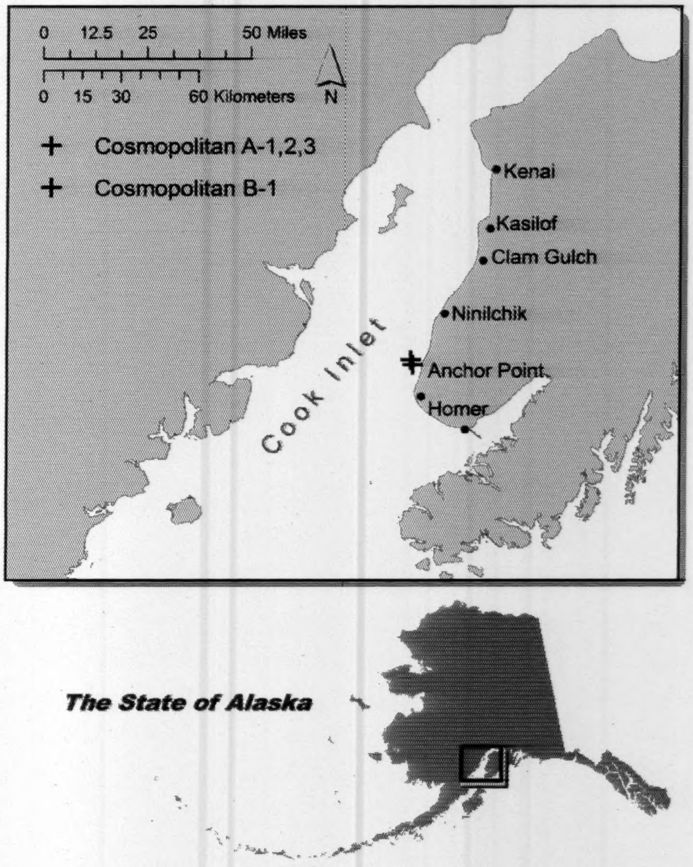
Well name	Latitude	Longitude	Water depth (m)
Cosmopolitan State #A–1	N 59°53′13.0″	W 151°52′58.0″	23.8
Cosmopolitan State #A–2	N 59°53′13.1″	W 151°52′58.1″	23.8
Cosmopolitan State #A–3	N 59°53′13.2″	W 151°52′58.2″	23.8
Cosmopolitan State #B–1	N 59°52′12″	W 151°52′17″	20.7

Whenever practicable, BlueCrest will use existing infrastructure and resources found on the Kenai Peninsula and south-central Alaska. These resources include barge landings, private staging areas, airstrips, landfills, water supplies, heavy equipment, and personnel. Most on-shore activity will base from either Kenai or Homer.

BlueCrest proposes to conduct its production and exploratory drilling using the *Spartan 151* drill rig or similar rig (*e.g.,* the Endeavour). The *Spartan 151* is a 150 H class independent leg, cantilevered jack-up drill rig with a drilling depth capability of 7,620 meters (m) (25,000 feet (ft)), that can operate in maximum water depths up to 46 m (150 ft). To maintain safety and work efficiency, the exploratory drill rigs will be equipped with the following:

- A 5,000-, 10,000-, or 15,000-pounds per square inch (psi) blowout preventer (BOP) stack—for drilling in higher pressure formations found at greater depths in Cook Inlet;
- Sufficient variable deck load to accommodate the increased drilling loads and tubular for deeper drilling;
- Reduced draft characteristics to enable the rig to easily access shallow water locations;
- Riser tensioning system to adequately deal with the extreme tides/currents in up to 91-m (300-ft) water depth;
- Steel hull designed to withstand −10 degrees Celsius to eliminate the risk of steel failure during operations in Cook Inlet (*i.e.,* built for North Sea arctic conditions); and
- Ability to cantilever over existing platforms for working on development wells or during plug and abandonment.

Figure 1. Locations of Proposed Cosmopolitan Well Sites



The *Spartan 151* is likely to be moored at Port Graham over the winter of 2015–2016 where it will undergo maintenance and winterization. BlueCrest proposes to move the drill rig to the Cosmopolitan State #B–1 well site at some point after April 15, 2016. The tow would likely be accomplished within a 48-hour (hr) period. Any subsequent move will be controlled by the owner of the drilling rig. The rig will be towed between locations by ocean-going tugs that are licensed to operate in Cook Inlet and will be conducted in accordance with State and Federal regulations. Rig moves will be conducted in a manner to minimize any potential risk regarding safety as well as cultural or environmental impact.

While under tow to the Cosmopolitan well sites, rig operations will be monitored by BlueCrest and the drilling contractor management. Very high frequency radio, satellite, and cellular phone communication systems will be used while the rig is under tow. Helicopter transport will also be available. A certified marine surveyor will be monitoring during rig moves.

The rig will be stocked with most of the drilling supplies required to complete a full summer program. Deliveries of remaining items, including crew transfers, will be performed by support vessels and helicopters.

BlueCrest proposes to use helicopters for project operations. This may include transportation for personnel, groceries, and supplies. Helicopter support will consist of a twin-turbine Bell 212 (or equivalent) helicopter certified for instrument flight rules for land and over-water operations. Helicopter crews and support personnel will be housed in existing Kenai area facilities. The helicopter will be based at the Kenai Airport and/or Homer Airport to support rig crew changes and cargo handling. No helicopter refueling will take place on the rig.

Helicopter flights to and from the rig are expected to average two per day. Flight routes will follow a direct route to and from the rig location, and flight heights will be maintained 300 to 450 m (1,000 to 1,500 ft) above ground level to avoid acoustical harassment of marine mammals (Richardson *et al.* 1995). The aircraft will be dedicated to the drilling operation and will be available for service 24 hr/day. A replacement aircraft will be available when major maintenance items are scheduled.

Major supplies will be staged onshore at Kenai. Required supplies and equipment will be moved from the staging area by contracted supply vessels and loaded aboard the rig when the rig is established on a drilling location and will include fuel, drilling water, mud materials, cement, casing, and well service equipment. Supply vessels will be outfitted with firefighting systems as part of fire prevention and control as required by Cook Inlet Spill Prevention and Response, Inc. (CISPRI).

Rig equipment will use diesel fuel or electricity from generators. Personnel associated with fuel delivery, transfer, and handling will be knowledgeable of Best Management Practices (BMP) of Industry (Collectively, the entities, personnel, and companies involved in the following activities: Oil and gas exploration, development, and production; oil and gas support services; and associated activities such as research). BMPs are related to fuel transfer and handling, drum labeling, secondary containment guidelines, and the use of liners/drip trays.

When planned and permitted operations are completed, the well will be suspended according to Alaska Oil and Gas Conservation Commission regulations. Drilling wastes include drilling fluids, known as mud, rock cuttings, and formation waters and will be discharged to the Cook Inlet under an approved Alaska Pollution Discharge Elimination System (APDES) general permit or sent to an approved waste disposal facility. Drilling wastes (hydrocarbon) will be delivered to an onshore permitted location for disposal. BlueCrest will follow BMPs and all stipulations of the applicable permits for this activity. Fluids and cutting management does not produce any noise signature to the marine environment that is not already included in other activities provided herein.

The project components with a potential for harassment of marine mammals include:

1. Towing of the jack-up drill rig to and between the Cosmopolitan well sites;
2. Impact hammering of the drive pipe at the well prior to drilling; and
3. The VSP operations that may occur at the completion of drilling.

For these activities the primary impact of concern is the effect the noise generated by these operations could have on local marine mammals. Underwater noise associated with drilling and rig operation has already been determined by the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) and the Service in prior consultations to have little effect on marine mammals (based on Marine Acoustics, Inc.'s (2011) acoustical testing of the *Spartan 151* while drilling), thus is not addressed further in this petition. Helicopters will be used to transport personnel on and off the drill rig, but any noise-related impacts to sea otters will be avoided by maintaining 300- to 450-m (1,000- to 1,500-ft) flight altitudes. The Service has determined that Level B disturbance harassment of sea otters can occur when the animals are exposed to underwater noise exceeding 160 dB, regardless of whether the noise is continuous or impulsive. Towing, CPD, and VSP are the only planned operations expected to produce underwater noise exceeding 160 dB, and are the subjects of this petition.

Rig Tow—The jack-up rig would be towed to the first well site (#B–1) during early spring or summer 2016. It is estimated that the tow will take about 48 hours to complete. Tows lasting less than a day will also occur between well sites. Tugs generate their loudest sounds while towing due to the propeller cavitations. These continuous sounds have been measured at up to 171 dB at 1-m source (Richardson *et al.* 1995), and they are generally emitted at dominant frequencies of well less than 5 kilohertz (kHz) (Miles *et al.* 1987, Richardson *et al.* 1995, Simmonds *et al.* 2004). Since it is currently unknown which tugs will be used to tow the rig on each tow (to and from the well site), and there are few sound signatures for tugs in general, it is assumed that noise exceeding 160 dB extends 253 m (830 ft) from the operating tugs (based on a 171 dB source). The tug's cavitating propellers do not exceed 190 dB at 1-m source, thus they do not represent a Level A injury take concern.

Drive Pipe Placement—A drive pipe is a relatively short, large-diameter pipe driven into the sediment prior to the drilling of oil wells. Drive pipes are usually installed using pile-driving techniques. BlueCrest proposes to drive approximately 60 m (200 ft below mudline) of 76.2-cm (30-in) pipe at each well site prior to drilling using a Delmar D62–22 impact hammer. This hammer has impact weight of 6,200 kilograms (kg) (13,640 pounds (lb)) and reaches a maximum impact energy of 224 kilonewton-m (165,215 ft-lb) at a drop height of 3.6 m (12 ft). Illingworth & Rodkin (2014) measured the noise from a hammer operating from the *Endeavour* in 2013 and found noise levels exceeding 160 dB out to 1.63 km (1 mi; disturbance zone), 180 dB to 170 m (560 ft; cetacean injury zone), and 190 dB to 55 m (180 ft; pinniped injury zone). The drive pipe driving event is expected to last 1 to 3 days at each well site (12 days maximum), although actual noise generation (pounding) would occur only intermittently during this period.

Vertical Seismic Profiling—Data on geological strata depth collected during initial seismic surveys at the surface can only be inferred. However, once a well is drilled, accurate followup seismic data can be collected by placing a receiver at known depths in the borehole and shooting a seismic airgun at the surface near the borehole. This data provides not only high-resolution images of the geological layers penetrated by the borehole, but can be used to accurately correlate (or correct) these original surface seismic data. The procedure is known as VSP. BlueCrest proposes to conduct VSP operations at the end of drilling each well using an array of airguns with total volumes of between 600 and 880 cubic inches (in^3). The actual size of the airgun array will not be determined until the final well depth is known. The VSP operation is expected to last less than 2 days at each well site. Illingworth & Rodkin (2014) measured noise levels associated with VSP (using a 750 in^3 airgun array) conducted at Cosmopolitan State #A–1 in 2013. The results indicated that the 190 dB radius (Level A take threshold for pinnipeds) from source was 120 m (394 ft), and the 160 dB radius (Level B disturbance take threshold) was 2.47 km (1.54 mi).

Dates and Duration of Proposed Activity and Specific Geographical Region

The request for incidental harassment authorization is for the 2016 drilling season at BlueCrest's Cosmopolitan State unit in lower Cook Inlet. Exploratory drilling will be conducted within a 165-day operating timeframe and completed by October 31, 2016. It is expected that the program will take 135 days to complete.

Distribution, Abundance, and Use of Sea Otters in the Area of Specified Activity

Based on the proposed activity area, this IHA addresses potential impacts of BlueCrest's exploration activities on the portion of the Southcentral Alaska stock of the northern sea otter that inhabits the eastern shoreline of lower Cook Inlet. The Southcentral stock is classified as "non-strategic" because the level of direct human-caused mortality does not exceed the Potential Biological Removal (PBR), and it is neither listed as "depleted" under MMPA, nor as "threatened" or "endangered" under the Endangered Species Act of 1973, as amended (ESA).

Sea otter populations found along the western shoreline of lower Cook Inlet, including Kamishak Bay, are part of the Southwest Alaska stock, which is listed as threatened under the ESA, but it is assumed that no Southwest Alaska stock sea otters will be impacted by the proposed project and are thus not analyzed as part of this IHA.

Based on the Service's 2014 Stock Assessment Report, the estimated abundance of the Southcentral sea otter stock (stock being analyzed as part of this IHA) is approximately 18,000 sea otters (USFWS 2014a). Aerial surveys in Kachemak Bay in 2002, 2007, and 2008, indicated that the sea otter population is increasing. The rate of increase for the Cook Inlet portion of the population is unknown because surveys have not been repeated; however, it is assumed to be similar to that in Kachemak Bay between 2002 and 2014. The 2002 estimate of sea otter population size for Cook Inlet was, therefore, adjusted to allow for population growth at the same rate as Kachemak Bay, which predicted an annual population growth of 495 animals and an estimated population size of 6,904 animals for Cook Inlet (USFWS 2014b). The relative abundance of otters in Cook Inlet is highest in the southern end of lower Cook Inlet in Kachemak and Kamishak bays. Upper Cook Inlet does not offer suitable habitat and is virtually devoid of sea otters. The northern portion of lower Cook Inlet, including the project area, is likely to have lower density of sea otters than Kachemak and Kamishak bays, but may have periods of high seasonal use.

There are no published sea otter estimates for the specified project area. Surveys suggest for most of the year, few sea otters inhabit waters north of Anchor Point (Rugh *et al.* 2005; Larned 2006; Gill *et al.* 2009; Doroff and Badajos 2010). Gill *et al.* (2009) did not survey north of Anchor Point, but did find rafts of dozens of sea otters along their transect line closest to Anchor Point during August, but not during May or February. Doroff and Badajos (2010) tracked 44 radio-tagged sea otters for 3 years, and did not locate any sea otters outside of Kachemak Bay other than a male that was subsistence harvested by a Ninilchik villager (although the exact location of harvest is unknown). During June surveys for beluga whales conducted between 1993 and 2004, Rugh *et al.* (2005) recorded 2,111 sea otters in lower Cook Inlet, but virtually none north of Anchor Point (even though the length of the Kenai Peninsula was surveyed each year).

Recent (2013) marine mammal monitoring (for the Cosmopolitan State exploratory drilling program) conducted 5 km (3 mi) offshore of Cape Starichkof revealed that during August, up to 481 sea otters (median of 72 sea otters) were found riding the tides between Anchor Point and some point well north of Cape Starichkof (Owl Ridge 2014). It is likely that this late summer phenomenon is a result of seasonal weather conditions that allow sea otters to safely ride the daily tides to foraging grounds outside Kachemak Bay. Since none of the previous surveys were conducted during the fall, it is unknown how late into fall large numbers of sea otters are found north of Anchor Point. Doroff and Badajos (2010) could not locate 10 of the radio-tagged sea otters in August 2009 but these were subsequently found in September 2009. It is possible that these sea otters had moved north of Anchor Point (outside the study area) during August, only to return to Kachemak Bay in September.

Thus, the primary concern with sea otters is where planned exploration activities and support activities might overlap with seasonal sea otter use north of Anchor Point in August. Sea otter use past October 31 is not relevant to this IHA as the activities will not be taking place. Survey activities will be conducted in the intertidal areas when those areas contain residual water (*i.e.,* slack tide), and thus the Service has determined that the onshore and intertidal portions of BlueCrest's proposed activities will not likely interact with, or impact, northern sea otters. Therefore, those seismic activities and related operations are not addressed in this IHA. Sea otters may be found within all water depths and distances from shore in the proposed project areas. During Kenai Peninsula and Lower Cook Inlet sea otter aerial surveys, Bodkin *et al.* (2003) found that sea otters predominantly use the nearshore areas (≥ 40 m; 131.2 ft) due to increased foraging opportunities (Riedman and Estes 1990; Schneider 1976).

Biological information for the Southcentral stock of northern sea otters can be found in the Service's Stock Assessment Report for the Southcentral Stock of Northern Sea Otters (Service 2014) (*http://www.fws.gov/alaska/fisheries/mmm/seaotters/reports.htm*).

Potential Impacts of the Activities on Sea Otters

Understanding the effects of sound from oil and gas exploration on sea otters is important for the health of sea otters and the development of parameters by which sea otter takes can be established and monitored. The proposed actions from BlueCrest have the potential to disturb sea otters, particularly in protected waters in nearshore habitats, which are used for resting, pup rearing, and foraging.

The proposed BlueCrest drilling operations that could impact local sea otters are impulsive acoustical harassment from the brief periods of CPD and VSP activities. Disruptions are not likely to be significant enough to rise to the level of a take unless the sound source displaces a sea otter from an important feeding or breeding area for a prolonged period, and this project is unlikely to do so. The continuous underwater noise generated by BlueCrest's proposed drilling operations would expose diving sea otters for only a couple of minutes at most.

The airborne sound sources include rig towing, noise generated from routine rig activities, and periodic air traffic. Routine boat traffic noise produced by all operators will also generate airborne sound. The Service believes that airborne sound sources will not exceed 160 dB (Level B harassment) and will not affect sea otters (Richardson 1995). Adherence to specified operating conditions for vessels and aircraft will ensure that these airborne sound sources do not take sea otters.

When disturbed by noise, sea otters may respond behaviorally (*e.g.,* escape response) or physiologically (*e.g.,* increased heart rate, hormonal response) (Harms *et al.* 1997; Tempel and Gutierrez 2003). Either response results in a diversion from one biological activity to another. That diversion may cause stress (Goudie and Jones 2004), and it redirects energy away from fitness-enhancing activities such as feeding and mating (Frid and Dill 2002). Other changes in activities as a result of anthropogenic noise can include increased alertness, vigilance, agonistic behavior, escape behavior, temporary or permanent abandonment of an area, weakened reflexes, and lowered learning responses (van Polanen Petel *et al.* 2006). Chronic stress can lead to loss of immune function, decreased body weight, impaired reproductive function, and abnormal thyroid function.

Despite the importance of understanding the effects of sound on sea otters, very few controlled experiments or field observations have been conducted to address this topic. Those studies that have been conducted conclude that sea otters are generally quite resistant to the effects of sound, and that change to presence, distribution, or behavior resulting from acoustic stimuli is rare (Ghoul *et al.* 2012a and b; Reichmuth and Ghoul 2012; Riedman 1984). Additionally, when sea otters have displayed behavioral disturbance to acoustic stimuli, they quickly become habituated and resume normal activity (Ghoul *et al.* 2012b).

The primary potential impact of the proposed BlueCrest drilling operations to local sea otters is from rig towing, noise generated from routine rig activities, periodic air traffic, and impulsive acoustical harassment from the brief periods of conductor pipe driving and VSP activities. Although the number of individual sea otters that might be exposed to harassment level noise represents a small portion of the total estimated stock population, what is known about the sea otter's behavioral responses to noise stimuli is addressed below. Disruptions are not likely to be significant enough to rise to the level of a take unless the sound source displaces a marine mammal from an important feeding or breeding area for a prolonged period, and this project is unlikely to do so.

Disturbance From Vessel Traffic and General Operations

Sea otters generally show a high degree of tolerance and habituation to shoreline activities and vessel traffic, but disturbance may cause animals to disperse from the local area. Populations of sea otters in Alaska have been known to avoid areas with heavy boat traffic but return to those same areas during seasons with less traffic (Garshelis and Garshelis 1984). Sea otters in Alaska have shown signs of disturbance (escape behaviors) in response to the presence and approach of survey vessels, including: Diving and/or actively swimming away from a boat; hauled-out sea otters entering the water; and groups of sea otters disbanding and swimming in multiple different directions (Udevitz *et al.* 1995). However, sea otters off the California coast showed only mild interest in boats passing within hundreds of meters, and sea otters in California appear to have habituated to boat traffic (Riedman 1983; Curland 1997). Their behavior is suggestive of a dynamic response to disturbance, abandoning areas when disturbed persistently and returning when the disturbance ceased. From the above research it is likely that some degree of disturbance from vessel traffic associated with the proposed actions will occur. Sea otters reacting to vessels they encounter may consume energy and divert time and attention from biologically important behaviors, such as feeding. However, these disturbances are expected to be short term in duration, and this potential short-term displacement is not anticipated to affect the overall fitness of any individual animal. We also anticipate that individual sea otters will habituate to the presence of project vessels and associated noise. Boat traffic, commercial and recreational, is constant in Cook Inlet. Some sea otters in the area of activity are likely to become habituated to vessel traffic and noise caused by vessels due to the existing continual traffic in the area. The additional vessel activity that will occur related to these three projects is not expected to substantially increase vessel noise or activity in the action area above that which is already occurring.

Sea otter collisions with vessels associated with the proposed project are unlikely. Tugs and barges are slow moving and pose little risk of colliding with sea otters. No fast boat use is proposed, and it is unlikely that housing and crew transfer vessels will impact sea otters. Vessels proposed for use to transfer housing and crew can produce noises exceeding 190 dB when traveling at higher speeds. However, the influence of this sound is limited to a distance of 2 to 4 m (6.6 to 13.1 ft) from the vessel. Adherence to operating conditions will ensure that these vessels do not take sea otters.

Disturbance From Noise

Effects of noise on marine mammals are highly variable and can be categorized as: Tolerance; masking of natural sounds; behavioral disturbance; temporary or permanent hearing impairment; and non-auditory effects, such as female-pup separations (Richardson *et al.* 1995). Whether a specific noise source will cause harm and/or disturbance to a sea otter depends on several factors, including the distance between the animal and the sound source, the sound intensity, background noise levels, the noise frequency (cycles per second; hertz (Hz) or kHz), noise duration, whether the noise is pulsed or continuous, and whether the noise source originates in the aquatic or terrestrial environment. For sea otters, behavioral reactions may be shown, such as changing durations of surfacing and dives; changing direction and/or speed; reduced/increased vocal activities; changing/cessation of socializing or feeding; visible startle response; avoidance of areas where noise sources are located; and/or flight response (*e.g.*, sea otters flushing into water from haul-outs). The consequences of behavioral modification have the potential to be biologically significant if the change affects growth, survival, and reproduction.

Information regarding the northern sea otter's hearing abilities is limited; however, the closely related southern sea otter has some information showing this subspecies' range of hearing. Reichmuth and Ghoul (2012) tested the aerial (from airborne sound sources) hearing capabilities of one male southern sea otter believed to have typical hearing. The study revealed an upper frequency hearing limit extending to at least 32 kHz and a low-frequency limit below 0.125 kHz. These results are generally consistent with comparable data for other carnivores, including terrestrial mustelids. This range is also similar to that of harbor seals (*Phoca vitulina;* Pinnipedia) (0.075 to 30 kHz) (Kastak and Schusterman 1998; Hemilä *et al.* 2006; Southall *et al.* 2007), which suggests pinnipeds may be a good proxy for sea otters.

Additionally, sea otters and harbor seals both exhibit amphibious hearing and spend a considerable amount of time above water, where they are not disturbed by airborne sound sources; southern sea otters spend about 80 percent of their time at the sea surface, whereas harbor seals may spend up to 60 percent of their time hauled out of the water (Frost *et al.* 2001).

Riedman (1983) examined changes in the behavior, density, and distribution of southern sea otters at Soberanes Point, California, that were exposed to recorded noises associated with oil and gas activity. The underwater sound sources were played at a level of 110 dB and a frequency range of 50–20,000 Hz and included production platform activity, drillship, helicopter, and semi-submersible sounds. Riedman (1983) also observed the sea otters during seismic airgun shots fired at decreasing distances from the nearshore environment (50, 20, 8, 3.8, 3, 1, and 0.5 nautical miles) at a firing rate of 4 shots per minute and a maximum air volume of 4,070 cubic inches. Riedman (1983) observed no changes in the presence, density, or behavior of sea otters as a result of underwater sounds from recordings or airguns, even at the closest distance of 0.5 nautical miles (<1 km). Sea otters did, however, display slight reactions to airborne engine noise. Riedman (1983) concluded that seismic activities had no measurable effect on sea otter behavior. The experiment was repeated the following year (Riedman 1984) with the same results.

In another controlled study using prerecorded sounds, Davis *et al.* (1988) exposed both northern sea otters in Simpson Bay, Alaska, and southern sea otters in Morro Bay, California, to a variety of aerial (airborne) and underwater sounds, including a warble tone, sea otter pup calls, killer whale calls, airhorns, and an underwater acoustic harassment system designed to drive marine mammals away from crude oil spills. The sounds were projected at a variety of frequencies, decibel levels, and intervals. The authors noted that certain acoustic stimuli could cause a startle response and result in dispersal. However, the disturbance effects were limited in range (no responses were observed for sea otters approximately 100–200 m (328–656 ft) from the source of the stimuli), and habituation to the stimuli was generally very quick (within hours or, at most, 3–4 days).

Previous work suggests that sea otters may be less responsive to marine seismic pulses than some other marine mammals. Riedman (1983, 1984) monitored the behavior of sea otters along the California coast while they were exposed to a single 100-in^3 airgun and a 4,089-in^3 airgun array. No disturbance reactions were evident when the airgun array was as close as 0.9 km. Sea otters also did not respond noticeably to the single airgun. Sea otters spend a great deal of time at the surface feeding and grooming (Riedman 1983, 1984; Wolt *et al.* 2012). While at the surface, the potential noise exposure of sea otters would be much reduced by pressure-release and interference (Lloyd's mirror) effects at the surface (Greene and Richardson 1988; Richardson *et al.* 1995). Finally, the average dive time of a northern sea otter has been measured at only 85 sec (Bodkin *et al.* 2004) to 149 sec (Wolt *et al.* 2007), thereby limiting exposure during active seismic operations. It remains unclear whether seismic generated sound levels even rise to the level of take at distances beyond 0.9 km, given the animal's poor underwater hearing ability and surface behavior.

Noise thresholds have been developed by NMFS to measure injury for pinnipeds (*i.e.,* on temporary threshold shift (TTS) and permanent threshold shift (PTS)). Sea otter–specific thresholds have not been determined; however, because of their biological similarities, we assume that noise thresholds developed by NMFS for injury for pinnipeds will be a surrogate for sea otter impacts as well. When PTS occurs, there is physical damage to the sound receptors in the ear. Severe cases can result in total or partial deafness. In other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985).

The noise thresholds established by NMFS for preventing injury to pinnipeds were developed as precautionary estimates of exposures below which physical injury would not occur. There is no empirical evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns (Southall *et al.* 2007). However, given the possibility that mammals close to an airgun array might incur at least mild TTS in the absence of appropriate mitigation measures, researchers have speculated about the possibility that some individuals occurring very close to airguns might incur PTS (*e.g.,* Richardson *et al.* 1995).

Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS. By means of preventing the onset of TTS, it is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause permanent hearing impairment. Until specific sea otter thresholds are developed for both Level A and Level B harassment and injury, the use of NMFS thresholds for pinnipeds as a surrogate for sea otters remains the best available information. NMFS's thresholds are further described and justified in NOAA (2005), NOAA (2006), NOAA (2008), and Southall *et al.* (2007) for our analysis.

A sea otter could experience a TTS as a result of BlueCrest's proposed operations, but there is no information on TTS impacts to sea otters, an animal that spends much time at the surface. The average dive time of a northern sea otter, is only 85 sec (Bodkin *et al.* 2004) to 149 sec (Wolt *et al.* 2012). Wolt *et al.* (2012) found Prince William Sound sea otters to average 8.6 dives per feeding bout. Multiplied by the average dive time (149 sec), the average total time a sea otter spends underwater during a feeding is about 21 min, or 12 to 18 percent of the time of a typical 2- to 3-hour slack-tide seismic shoot. Except for loud screams between pups and mothers (McShane *et al.* 1995), sea otters do not appear to communicate vocally, either at the surface or under water, and they do not use sound to detect prey. Thus, any TTS due to seismic noise is unlikely to mask communication or reduce foraging efficiency. Finally, sea otters are unlikely to rely on sound to detect and avoid predators. For example, sea otters at the surface are not likely to hear killer whale vocalizations.

A PTS occurs when continuous noise exposure causes hairs within the inner ear system to die. This can occur due to moderate durations of very loud noise levels, or long-term continuous exposure of moderate noise levels. However, PTS is also not an issue with sea otters and impulsive seismic noise. Sea otter exposure to underwater noises generated by vessels (propellers) would be of very short duration because the average dive time of a northern sea otter is only 85 sec (Bodkin *et al.* 2004) to 149 sec (Wolt *et al.* 2012). Airborne exposure is of little concern since pressure release and Lloyd's mirror-effect will reduce underwater seismic noise transmitted to the air. Riedman's (1983, 1984) observations of sea otters lack of reaction to seismic noise was likely due largely to these transmission limits.

In conclusion, using information available for other marine mammals as a surrogate, and taking into consideration what is known about sea otters, the Service has set the received sound level under water of 160 dB as a threshold for Level B take by disturbance for sea otters for this proposed IHA (Ghoul and Reichmuth 2012a and b, McShane *et al.* 1995, NOAA 2005, Riedman 1983, Richardson *et al.* 1995). Exposure to unmitigated noise levels in the water greater than 160 dB will be considered by the Service as potentially injurious Level B take; and levels above 190 dB will be considered Level A take threshold for sea otters. Level A take will not be authorized and will be avoided through mitigation measures.

Seismic Operations

Air gun arrays typically produce most noise energy in the 10 to 120 Hertz (Hz) range, with some energy extending to 1,000 Hz (Richardson *et al.* 1995). Sound reception studies by Ghoul and Reichmuth (2012) determined that sea otters effectively hear between 125 Hz and 32 kHz, or above the range where most seismic energy is produced. Thus, sea otters appear to have limited hearing of seismic air guns (especially compared to humans with effective hearing down to 20 Hz). To the extent that sea otters can detect seismic noise, the potential effects of BlueCrest's proposed activities are described below.

Masking occurs when louder noises interfere with marine mammal vocalizations or their ability to hear natural sounds in their environment (Richardson *et al.* 1995). These noise levels limit their ability to communicate and avoid predation or other natural hazards. However, as mentioned above, sea otters do not vocally communicate underwater (Ghoul and Reichmuth 2012), and masking due to exposure to underwater noise is not relevant. Sea otters do communicate above water with the loud screams between separated mothers and pups (McShane *et al.* 1995). Ghoul and Reichmuth (2012) measured these vocalizations and found that the intensity of these calls ranged between 50 and 113 dB Sound Pressure Level (SPL), and were loud enough that they can be heard by humans at distances exceeding 1 km (0.62 miles) (McShane *et al.* 1995). Any potential masking effect from any noise entering the air from the seismic guns would be brief (a shot) and would likely disappear a few meters from the source.

The seismic airguns that will be used during BlueCrest's Cook Inlet operation have the potential to acoustically injure marine mammals at close proximity. As no sound levels have been effectively measured to establish the threshold where injury caused by an acoustic source exists, the 190-dB criterion for seals applies most closely to sea otters given their more similar natural history than compared to cetaceans.

BlueCrest intends to conduct VSP operations at the end of drilling each well using an array of airguns with total volumes of between 600 and 880 cubic inches (in3). The VSP operation is expected to last less than two days at each well site. Illingworth & Rodkin (2014) measured noise levels associated with VSP (using a 750 in^3 airgun array) conducted at Cosmopolitan State #A–1 in 2013. The results indicated that the 190 dB radius (Level A take threshold) from source was 120 m (394 ft), and the 160 dB radius (Level B disturbance take threshold) was 2.47 km (1.54 mi).

Seismic operations could also cause behavioral effects on sea otters. For example, severe disturbance from seismic noise or activities could cause female-pup separations, male territory abandonment, male territory shifts and conflicts between territories, breakup of rafts of nonbreeding males, and/or movement by individual sea otters out of nearshore areas into deeper water. These types of displacement events, if they occurred, could have repercussions on breeding success and/or survival due to increased risk of predation or other adverse conditions. However, because sea otters spend relatively large amounts of time above the water surface compared to other marine mammals, sea otters' potential exposure to the underwater acoustic stimuli, such as those associated with seismic surveys (Greene and Richardson 1988), may be lower than that of other marine mammal species (Richardson et al. 2011). As previously stated, studies have not shown these kinds of dramatic responses when sea otters were exposed to seismic operations. Therefore, we have no reason to believe that sea otters will exhibit any of these reactions during these activities.

To date, there is no evidence that serious injury, death, or stranding of sea otters can occur from exposure to airgun pulses, even in the case of large airgun arrays. As a result, the Service does not expect any sea otters to incur serious injury (Level A harassment) or mortality in Cook Inlet or strand as a result of the proposed activities.

Drilling Operations

For BlueCrest's drilling operation, two project components have the potential to disturb sea otters: Driving the conductor pipe at each well prior to drilling, and VSP operations that may occur at the completion of each well drilling. As described in BlueCrest's petition, the CPD and VSP are impulsive noise activities. Here the Level B disturbance exposure to sound levels greater than 160 dB applies, and take is addressed relative to noise levels exceeding 160 dB, above which disturbance can occur until 190 dB, after which potential injury and Level A disturbance can occur.

Conductor Pipe Driving (CPD)

A conductor pipe is a relatively short, large-diameter pipe driven into the sediment prior to the drilling of oil wells. Conductor pipes are usually installed using drilling, pile driving, or a combination of these techniques. BlueCrest proposes to drive approximately 90 m (300 ft) of 76.2-cm (30-in) conductor pipe at Cosmopolitan #2 (and any associated delineation wells) prior to drilling using a Delmar D62–22 impact hammer. This hammer has impact weight of 6,200 kg (13,640 pounds) and reaches maximum impact energy of 224 kilonewton-m (165,215 foot-pounds) at a drop height of 3.6 m (12 ft).

Blackwell (2005) measured the noise produced by a Delmar D62–22 driving 91.4-cm (36-inch) steel pipe in Cook Inlet and found sound pressure levels to exceed 190 dB at about 60 m (200 ft), 180 dB at about 250 m (820 ft), and 160 dB at just less than 1.9 km (1.2 mi). Each CPD event is expected to last 1 to 3 days, although actual noise generation (pounding) would occur only intermittently during this period. It is anticipated that sea otters will move away from any sound disturbance caused by the pipe driving or become habituated.

Vertical Seismic Profiling

Once a well is drilled, accurate followup seismic data can be collected by placing a receiver at known depths in the borehole and shooting a seismic airgun at the surface near the borehole. This gathered data provides not only high-resolution images of the geological layers penetrated by the borehole, called VSP, but it can also be used to accurately correlate (or correct) the original surface seismic data.

BlueCrest intends to conduct VSP operations at the end of drilling each well using an array of airguns with total volumes of between 9.83 and 14.42 liters (600 and 880 in3). Each VSP operation is expected to last less than 1 or 2 days. Assuming a 1-m source level of 227 dB for a 14.42-liter (880-cubic-inch) array and using Collins et al.'s (2007) transmission loss model for the Cook Inlet (18.4 Log(R) − 0.00188R), the 190-dB radius (Level A take threshold for pinnipeds and surrogate for sea otters) from source was estimated at 100 m (330 ft), and the 160-dB radius (Level B disturbance take threshold for all sea otters) at 2.46 km (1.53 mi). These were the initial injury and safety zones established for monitoring during a VSP operation conducted by Buccaneer at Cosmopolitan State #1 during July 2013. Illingworth and Rodkin (2013) measured the underwater noise levels associated with the July 2013 VSP operation using an 11.8-liter (720 in3) array and found the noise exceeding 160 dB extended out 2.47 km (1.56 mi) or virtually identical to the modeled distance. The measured radius to the 190-dB level was 75 m (246 ft). The best fit model for the empirical data was 227 − 19.75

log(R) – 0.0R (Illingworth and Rodkin 2013).

Exploratory Drilling and Standard Operation

The jack-up drilling rig, *Endeavour,* is not expected to impact sea otters. Lattice-legged, jack-up drill rigs are relatively quiet because the lattice legs limit transfer of noise generated from the drilling table to the water (Richardson *et al.* 1995, Spence *et al.* 2007). Further, the drilling platform and other noise-generating equipment are located above the ocean surface, so there is very little surface contact with the water compared to drill ships and semi-submersible drill rigs. For example, the *Spartan 151,* the only other jack-up drilling rig operating in the Cook Inlet, was hydro-acoustically measured by Marine Acoustics, Inc. (2011) while operating in 2011. The survey results showed that continuous noise levels exceeding 120 dB extended out only 50 m (164 ft), and that this noise was largely associated with the diesel engines used as power generators. The *Endeavour* was hydro-acoustically tested during drilling activities by Illingworth and Rodkin (2013) in May 2013, while the rig was operating at Cosmopolitan State #1. The results from the sound source verification indicated that noise generated from drilling or generators were below ambient noise. The generators used on the *Endeavour* are mounted on pedestals specifically to reduce noise transfer through the infrastructure, and they are enclosed in an insulated engine room. In addition, the submersed deep-well pumps that cool the generators and charge the fire-suppression system also generate noise levels exceeding 120 dB out a distance of approximately 300 m (984 ft). However, the Service does not anticipate that this level of noise will impact sea otters. Thus, neither actual drilling operations nor running generators on the *Endeavour* drill rig generates underwater noise levels exceeding 120 dB.

For this IHA analysis, acoustical injury to sea otters can occur if received noise levels exceed 190 dB. This is classified as a Level A take (injury), which is not authorized by IHAs. The towing, drilling, and pump operations to be used during BlueCrest's program do not have the potential to acoustically injure marine mammals. Therefore, no shutdown safety zones will be established for these activities. However, the conductor pipe driving and VSP operations do generate impulsive noises exceeding 190 dB. Based on the estimated distances to the 190-dB isopleth addressed above, a 60-m (200-ft) shutdown safety zone will be established and monitored during conductor pipe driving (at least until the noise levels are empirically verified), while a 75-m (246-ft) shutdown safety zone will be monitored during VSP operations. Northern sea otters may be disturbed at noise levels between 160 dB to 190 dB, where disturbance can occur (Level B harassment) out to approximately 0.75 km (2.5 mi). If these takes occur, they are likely to result in nothing more than short-term changes in behavior.

Estimated Incidental Take of Sea Otters by Harassment

As described earlier, the Service anticipates that incidental take will occur during Cook Inlet oil and gas activities conducted by BlueCrest. In the sections below, we estimate take by harassment of the numbers of sea otters from the Southcentral stock that are likely to be affected during the proposed activities. The proposed BlueCrest activities, previously discussed in detail, will primarily occur in a limited area around the drilling rigs at the Cosmopolitan #A–2, #A–3, and #B–1 sites.

The jack-up rig would be towed to the Cosmopolitan State well site coming from either Port Graham, a travel distance of about 50 km (31 mi), or from upper Cook Inlet approximately 100 km (62 mi) north of Cosmopolitan State (Figure 6–1, Owl Ridge 2015, page 14). After drilling is complete, the rig will be released and moved away from the well sites to a location of the owner's discretion. The jack-up rig could be towed multiple times during 2016, but only the tow from Port Graham or upper Cook Inlet to Cosmopolitan State #2, and between Cosmopolitan State #2 and #1, are addressed in this IHA petition. It is estimated that the longer tows (to and from the Cosmopolitan State leases) will take 2 days to complete, while tows between Cosmopolitan well sites will take but a few hours. The rig will be wet-towed by two or three ocean-going tugs licensed to operate in Cook Inlet. Tugs generate their loudest sounds while towing due to propeller cavitation. These continuous sounds have been measured at up to 171 dB at source (broadband), and are generally emitted at dominant frequencies of less than 5 kHz (Miles *et al.* 1987, Richardson *et al.* 1995, Simmonds *et al.* 2004).

The dominant noise frequencies from propeller cavitation are significantly less than the dominant hearing frequencies for pinnipeds (10 to 30 kHz) and toothed whales (12 to >100 kHz), but within the hearing range of sea otters in general (Wartzok and Ketten 1999). Also, because it is currently unknown which tug or tugs will be used to tow the rig, and there are few sound signatures for tugs in general, the potential area that could be ensonified by disturbance level noise is calculated based on an assumed 171 dB source. Using Collins *et al.'s* (2007) 18.4 Log(R)–0.00188R spreading model, we determine from hydroacoustic surveys in Cook Inlet, the distance to the 160 dB isopleth would be at 253 meters (830 feet). Therefore, while towing, the operating tug would ensonify a strip 0.51 km (0.31 mi) wide. The ensonified area of the route was determined by multiplying route length by the ensonified strip width, which equates to 253 m multiplied by 2. Subsequently, the ZOI for the route from Port Graham to well site #B–1 is 25.3 km^2, for the route from upper Cook Inlet to #B–1 is 50.6 km^2, and for the route between #B–1 and #A–2 is 0.84 km^2. Rig movement between well site #A–2 and #A–3 is only a few meters and represents a ZOI of 0.40 km^2. Depending on the route of the tow, it is expected that no more than 10 km of the entire (regardless of direction) track will occur within the expected otter habitat (5 km from shore) and represents a ZOI of 5.1 km^2.

Ensonified Area—Pipe Driving

The Delmar D62–22 diesel impact hammer proposed to be used by BlueCrest to drive the 76.2-cm (30-in) conductor pipe was previously acoustically measured by Illingworth & Rodkin (2014) during drilling operations at Cosmopolitan State #A–1. They found that sound exceeding Level A noise limits for pinnipeds (and presumably for sea otters) to extend to about 55 m (180 ft). Level B disturbance levels extended to just less than 1.63 km (1.0 mi). The associated ZOI (area ensonified by noise greater than 160 dB) is 8.3 km^2 (3.1 mi^2).

Ensonified Area—Vertical Seismic Profiling

Illingworth & Rodkin (2014) measured noise levels associated with VSP (using a 750 in^3 airgun array) conducted at Cosmopolitan State #A–1 in 2013. Their results indicated that the 190 dB radius (Level A take threshold for pinnipeds and presumably sea otters) from source was 120 m (394 ft), and the 160 dB radius (Level B disturbance take threshold) was 2.47 km (1.54 mi). Based on these results, the associated (160 dB) ZOI would be 19.2 km^2 (7.4 mi^2).

Sea Otter Densities

There are no published sea otter density estimates for the nearshore area along the Kenai Peninsula. Larned (2006) estimated from winter surveys for Steller's eider that there were 92 sea otters (December 2004) inhabiting the survey area—a 300-km² area north of Anchor Point. Larned (2006) also estimated that the expansion factor, or the ratio of the full survey area to the area actually sampled, was 3.27. Applied to the count data the estimated number of sea otters in the survey area north of Anchor Point was 300 animals, or 1.0/km². This estimate does not take into account missed animals; either because they were submerged or difficult to distinguish from the aerial platform (especially pups). Evans *et al.* (1997) calculated a correction factor of 2.38 for sea otters missed during aerial surveys conducted along the Aleutian Islands. Applying this correction factor (2.38) to the calculated density of 1.0 km² increases the estimated sea otter density to 2.38 sea otters/km². A fall 2013 survey (Owl Ridge unpublished data) of this region using line-transect methods and program DISTANCE produced a density estimate of 2.6 sea otters/km². It is, therefore, realistic to utilize the 2.38 density estimate in calculating estimated exposures.

Exposure Calculations

For purposes of this analysis, "potential exposure" was defined as a sea otter occurring within an active ZOI of a specific noise-generating activity. As discussed below, this potential exposure does not necessarily constitute a Level B take, especially if the sea otter remains above water and is not directly exposed to underwater noise. Thus, the calculated exposure values represent the number of sea otters that are in a position (within an active ZOI) of receiving harassment take noise levels should they dive during the encounter.

The estimated potential exposures of sea otters by BlueCrest's planned exploratory drilling project was determined using density estimates derived from Larned (2006) above as adjusted for missed animals (2.38/km²). Potential exposures were derived by multiplying the maximum density (2.38 sea otters/km²) by the ZOI for each activity and then by the estimated number of days the activity would occur. The rig tow is expected to last for about 2 to 3 days, the pipe driving about 12 days, and the VSP about 3 days. However, pipe driving and VSP activity will occur only sporadically on any given day. The exposure calculations can be found in Table 2.

TABLE 2—ESTIMATED NUMBER OF POTENTIAL EXPOSURES DURING THE 2016 DRILLING PERIOD

	Tow	Conductor pipe	VSP	Total
ZOI (km²)	5.1	8.3	19.2	
Otter Density (No./km²)	2.38	2.38	2.38	
Days	NA	12	3	
Potential Exposures	12	238	138	388

As mentioned above, an acoustical harassment take of a sea otter does not occur should the animal remain at the surface during the period it is found within the ZOI. During the 2013 drilling activities at Cosmopolitan State #1, only 52 of 356 recorded sea otters, or about 15 percent, actually dove underwater while within 260 m (853 ft) of the drill rig (most sea otters simply drifted past, and were often asleep). Thus, the exposure estimate of 388 found in Table 2 is conservative because it does not take into account that most sea otters are not expected to dive while drifting past the rig operations.

Take Authorization Request

The potential exposures for the 2016 drilling period, based on sea otter density, is estimated to be 388 sea otters (Table 2), or about 2.1 percent of the stock. Taking into account the 15 percent of the sea otters that are likely to dive while in the vicinity of the drill rig, the estimated number of exposures reduces to 58, or about 0.4 percent of the stock. However, because sea otter behavior is difficult to predict, the more conservative 388 sea otters potentially exposed is the requested authorization.

The Service determined that the BlueCrest activities most likely to result in the take of sea otters, as defined under the MMPA, are CPD and VSP. These activities will generate noise levels in the water that may cause short-term, temporary, nonlethal, but biologically significant changes in behavior to sea otters that the Service considers to be Level B take by disturbance under the MMPA. Other proposed activities, such as rig towing, noise generated from routine rig activities, routine boat traffic, and periodic air traffic were considered to have a limited potential for disturbance leading to Level B take. Adherence to specified operating conditions will ensure that take is minimized. The Service made these determinations, in part, based on information provided in the petition materials provided by BlueCrest, including the Marine Mammal Monitoring and Mitigation Plan (4MP).

Potential Effects on Sea Otter Habitat

As described previously, the primary potential impacts to sea otters are associated with high-energy impulsive sound levels. However, other potential impacts are also possible to the surrounding habitat from physical disturbance, discharges, or an oil spill.

Since sea otters typically inhabit nearshore marine areas, shoreline length is a readily available metric that can be used to quantify sea otter habitat. The total length of shoreline within the range of the Southcentral Alaska stock of northern sea otters is approximately 2,575 km (1,600 mi), of which 540 km (335.5 mi) are located within Cook Inlet. Of that, the total length of shoreline for the proposed activities is a small percentage of the total shoreline habitat available to the Southcentral sea otter stock.

Potential Impacts to Prey

In addition to the disturbances outlined above to sea otter habitat from noise, seismic activities could affect sea otter habitat in the form of impacts to prey species. The primary prey species for sea otters are sea urchins, abalone, clams, mussels, crabs, and squid (Tinker and Estes 1999). When preferential prey are scarce, sea otters will also eat kelp, crabs, clams, turban snails, octopuses, barnacles, sea stars, scallops, rock oysters, fat innkeeper worms, and chitons (Riedman and Estes 1990).

Potential Impacts From Seismic Surveys

Little research has been conducted on the effects of seismic operations on invertebrates (Normandeau Associates, Inc. 2012). Christian et al. (2003) concluded that there were no obvious effects from seismic signals on crab behavior and no significant effects on the health of adult crabs. Pearson et al. (1994) had previously found no effects of seismic signals upon crab larvae for exposures as close as 1 m (3.3 ft) from the array, or for mean sound pressure as high as 231 dB. Invertebrates such as mussels, clams, and crabs do not have auditory systems or swim bladders that could be affected by sound pressure. Squid and other invertebrate species have complex statocysts (Nixon and Young 2003) that resemble the otolith organs of fish that may allow them to detect sounds (Budelmann 1992). Normandeau Associates, Inc. (2012) concluded that invertebrates are sensitive to local water movements and to low-frequency particle accelerations generated by sources in their close vicinity. Based on these results, impulsive CPD and VSP could acoustically impact local marine communities, but only out to about 2 or 3 m (6 to 9 ft) at most. From an ecological community standpoint, these impacts are considered minor.

Potential Impacts From Drill Rig Presence

The potential direct habitat impact by the BlueCrest drilling operation is limited to the actual drill-rig footprint defined as the area occupied and enclosed by the drill-rig legs. The jack-up rig will temporarily disturb up to three offshore locations in upper Cook Inlet, where the wells are proposed to be drilled. Bottom disturbance would occur in the area where the three legs of the rig would be set down and where the actual well would be drilled.

The Cosmopolitan State #B–1 well site is located in lower Cook Inlet. Cook Inlet is a large subarctic estuary roughly 300 km (186 mi) in length and averaging 96 km (60 mi) in width. It extends from the city of Anchorage at its northern end and flows into the Gulf of Alaska at its southernmost. For descriptive purposes, Cook Inlet is separated into unique upper and lower sections, divided at the East and West Forelands, where the opposing peninsulas create a natural waistline in the length of the waterway, measuring approximately 16 km (10 mi) across (Mulherin *et al.* 2001).

The potential direct habitat impact by the BlueCrest drilling operation is limited to the actual drill-rig footprint defined as the area occupied and enclosed by the drill rig legs. This area was calculated as 0.22 hectares (ha) (0.54 acres) during the land use permitting process. The collective 0.8-ha (2-ac) footprint of the well represents a very small fraction of the 18,950-km^2 (7,300-mi^2) Cook Inlet surface area. Potential damage to the Cook Inlet benthic community will be limited, however, to the actual surface area of the three spud cans (collective total of 442 m^2 (4,755 ft^2)) that form the "foot" of each leg. Given the high tidal energy at the well site locations, drilling footprints are not expected to support benthic communities equivalent to shallow lower energy sites found in nearshore waters. The presence of the drill rig is not expected to result in any direct loss of sea otter habitat.

Potential Impacts From Drilling Discharges

The drill rigs will operate under an APDES general permit for wastewater discharges. This permit authorizes discharges from oil and gas extraction facilities engaged in exploration under the Offshore and Coastal Subcategories of the Oil and Gas Extraction Point Source Category (40 CFR part 435). Twelve effluents are authorized for discharge into Cook Inlet once discharge limits set by the Alaska Department of Environmental Conservation have been met. The authorized discharges include drilling fluids and drill cuttings, deck drainage, sanitary waste, domestic waste, blowout preventer fluid, boiler blowdown, fire control system test water, uncontaminated ballast water, bilge water, excess cement slurry, mud cuttings cement at sea floor, and completion fluids. The drill rig will also be authorized under the Environmental Protection Agency's (EPA's) Vessel General Permit for deck washdown and runoff, gray water, and gray water mixed with sewage discharges. Drilling wastes include drilling fluids, known as mud, rock cuttings, and formation waters. Drilling wastes (non-hydrocarbon) will be discharged to the Cook Inlet under the approved APDES general permit.

Drilling wastes (hydrocarbon) will be delivered to an onshore permitted location for disposal. BlueCrest will conduct an Environmental Monitoring Study of relevant hydrographic, sediment hydrocarbon, and heavy metal data from surveys conducted before and during drilling mud disposal and at least 1 year after drilling operations cease in accordance with the APDES general permit for discharges of drilling muds and cuttings.

Non-drilling wastewater includes deck drainage, sanitary waste, domestic waste, blowout preventer fluid, boiler blowdown, fire control test water, bilge water, noncontact cooling water, and uncontaminated ballast water. Non-drilling wastewater will be discharged into Cook Inlet under the approved APDES general permit or delivered to an onshore permitted location for disposal. Mud cuttings will be constantly tested. Hydrocarbon-contaminated muds will be hauled offsite. Solid waste (*e.g.,* packaging, domestic trash) will be classified, segregated, and labeled as general, universal, and Resource Conservation and Recovery Act exempt or nonexempt waste. Solid waste will be stored in containers at designated accumulation areas until it can be packaged and transported to an approved onshore disposal facility. Hazardous wastes should not be generated as a result of this project. However, if any hazardous wastes are generated, they will be temporarily stored in an onboard satellite accumulation area and then transported offsite for disposal at an approved facility.

Discharging drill cuttings or other liquid waste streams generated by the drilling rig—even in permitted amounts—could potentially affect marine mammal habitat. Toxins could persist in the water column, which could have an impact on marine mammal prey species. However, despite a considerable amount of investment in research on exposures of marine mammals to organochlorines or other toxins, no marine mammal deaths in the wild can be conclusively linked to the direct exposure to such substances (O'Shea 1999).

Drilling muds and cuttings discharged to the seafloor can lead to localized increased turbidity and increase in background concentrations of barium and occasionally other metals in sediments and may affect lower trophic organisms. Drilling muds are composed primarily of bentonite (clay), and the toxicity is, therefore, low. Heavy metals in the mud may be absorbed by benthic organisms, but studies have shown that heavy metals do not bio-magnify in marine food webs (Neff *et al.* 1989). Effects on benthic communities are nearly always restricted to a zone within about 100 to 150 m (328 to 492 ft) of the discharge, where cuttings accumulations are greatest. Discharges and drill cuttings could impact fish by displacing them from the affected area. No water quality impacts are anticipated from permitted discharges that would negatively affect habitat for Cook Inlet sea otters.

Potential Impacts From an Oil Spill or Unpermitted Discharge

The probability of an oil spill from the proposed activities is low. Potential sources would be a release from a vessel. An oil spill or unpermitted discharge is an illegal act; IHAs do not authorize takes of sea otters caused by illegal or unpermitted activities.

If an oil spill did occur, the most likely impact upon sea otters would be mortality due to exposure to and ingestion of spilled oil. Also, contamination of sea otter habitat, their invertebrate prey, and prey habitat would most likely result in a range of impacts ranging from sublethal to lethal, depending on a wide variety of factors. Spill response activities are not likely to disturb the prey items of sea otters sufficiently to cause more than minor effects. Spill response activities could cause sea otters to avoid contaminated habitat that is being cleaned.

Based on the preceding discussion of potential types and likelihood of impacts to sea otters, their prey, and habitat, the Service anticipates that the proposed activities are not likely to cause more than negligible, short-term, and temporary impacts to a small number of sea otters and to a small fraction of sea otter habitat.

Potential Impacts on Subsistence Uses

The MMPA allows for Alaska Natives to harvest sea otters for subsistence purposes or for the purposes of creating authentic Native articles of handicrafts and clothing, provided this is accomplished in a non-wasteful manner.

Data from the Service's Marine Mammal Marking, Tagging, and Reporting Program (MTRP) indicates that between 1989 and 2015 (27 years), Alaska Natives harvested a total of 715 sea otters hunting from the community of Homer, while Port Graham reported 215, Seldovia 122, Nanwalek 39, Kenai 31, and Ninilchik 16 sea otters harvested (USFWS MTRP unpublished data); the mean reported annual subsistence take from 2009 through 2015 from Homer, Port Graham, Seldovia, Nanwalek, Kenai, and Ninilchik of sea otters in or near the proposed project areas was 239 animals (USFWS MTRP unpublished. data).

BlueCrest has reached out and coordinated with local communities, including Kenai, Homer, and Ninilchik, as well as Kenai Peninsula Borough and Cook Inlet Region, Inc. Any observed sea otter interactions with the BlueCrest operations deemed potentially harmful will be immediately reported to the Service by BlueCrest or their representative.

The impact of drilling operations is unlikely to affect any sea otter sufficient to render it unavailable for subsistence harvest in the future. Oil spill trajectory scenarios indicate that potential spills would travel south through the central channel of the inlet away from shoreline subsistence harvest areas. For these reasons, we conclude that these activities will not impact the availability of sea otters for subsistence harvest in Cook Inlet.

Mitigation Measures

Holders of an IHA must use methods and conduct activities in a manner that minimizes to the greatest extent practicable adverse impacts on sea otters, their habitat, and on the availability of sea otters for subsistence uses. Adaptive management approaches, such as temporal or spatial limitations in response to the presence of sea otters in a particular place or time or the occurrence of sea otters engaged in a particularly sensitive activity (such as feeding), must be used to avoid or minimize interactions with sea otters, and subsistence users of these resources. BlueCrest has developed a 4MP for proposed Cook Inlet drilling activities. This 4MP is designed to monitor and mitigate for all marine mammals regardless of status or agency jurisdiction. The primary concern is the harassing levels of underwater noise produced by the drilling program operations.

Compared to non-jack-up drill rigs, the use of the jack-up drilling rig *Spartan 151* will mitigate potential noise impacts. Jack-up rigs have less surface contact with the water and convey less noise from the drilling table and generators into the underwater environment. Sound source verifications conducted by MAI (2011) confirmed that underwater drilling and generator noises produced by the *Spartan 151* are near ambient.

Shutdown safety zones will be established and monitored during pipe driving and VSP activities. Shutdowns will be implemented to avoid injury take to all marine mammals including sea otters.

In the unlikely event of an oil spill, BlueCrest will be working with CISPRI, which is certified as a U.S. Coast Guard oil spill removal organization and State of Alaska Primary Response Action Contractor serving the Cook Inlet region of Alaska. BlueCrest will follow the procedures as outlined in CISPRI's Technical Manual, Wildlife Tactics. Most procedures discussed in the CISPRI Technical Manual are associated with responses for either waterfowl or marine mammals. The CISPRI will dedicate personnel and equipment as appropriate in support of wildlife during a spill. The Planning Chief will work to implement a Wildlife Plan addressing those species anticipated to be at risk and needing protection. The protocols are described in further detail in the Oil Discharge Prevention and Contingency Plan.

Under this Authorization, BlueCrest will be required to use the following mitigation measures to ensure no Level A and no more than authorized Level B takes of sea otters occur. These include conditions for operational and support vessels, aircraft, offshore seismic surveys, safety zones, ramp-up procedures, power down and shutdown, emergency shutdown, Drill Rig Tows, Drive Pipe Driving, Rig Operation, VSP Operations, and Sea Otter Observers. BlueCrest will also be required to have sufficient and continual sound monitoring equipment to ensure that following mitigation measures can be applied. BlueCrest's 4MP and the following mitigation measures will ensure that the numbers of Southcentral stock of sea otters likely to be encountered during project operations will ensure that Level B take will be minimal and below the prescribed take allowance.

Operational and Support Vessels

- Operational and support vessels must be staffed with trained and qualified observers to alert crew of the presence of sea otters and initiate adaptive mitigation responses.
- Vessel operators must take every precaution to avoid harassment to sea otters when a vessel is operating near these animals.
- Vessels must reduce speed and maintain a distance of 100 m (328 ft) from all sea otters when practicable.
- Vessels may not be operated in such a way as to separate members of a group of sea otters from other members of the group.
- When weather conditions require, such as when visibility drops, vessels should adjust speed accordingly to avoid the likelihood of injury to sea otters.
- All vessels must avoid areas of active or anticipated subsistence hunting for sea otters as determined through community consultations.
- We may require a monitor on site of the activity or onboard drillships, drill rigs, support vessels, aircraft, or vehicles to monitor the impacts of an activity on sea otters.

Aircraft

- Operators of support aircraft must, at all times, conduct their activities at the maximum distance possible from sea otters.
- Fixed-wing aircraft must operate at an altitude no lower than 91 m (300 ft) in the vicinity of sea otters.
- Rotary winged aircraft (helicopters) must operate at an altitude no lower than 305 m (1,000 ft) in the vicinity of sea otters.
- When weather conditions do not safely allow the required minimum altitudes stipulated above, such as

during severe storms or when cloud cover is low, aircraft may be operated at lower altitudes.

- When aircraft are operated at altitudes below the required minimum altitudes, the operator must avoid known sea otter locations and should take precautions to avoid flying directly over these areas.
- Aircraft routes must be planned to minimize any potential conflict with active or anticipated sea otter subsistence hunting activity as determined through community consultations.

Offshore Seismic Surveys

Any offshore exploration activity expected to include the production of pulsed underwater sounds with sound source levels ≥160 dB will be required to establish and monitor acoustic safety zones and implement adaptive mitigation measures as follows:

Safety Zones

Establish and monitor with trained and qualified observers an acoustically verified disturbance zone surrounding seismic source arrays where the received level will be ≥160 dB and an acoustically verified safety zone surrounding seismic source arrays where the received level will be ≥190 dB.

Ramp-Up Procedures

For all seismic surveys, including airgun testing, use the following ramp-up procedures to allow marine mammals to depart the disturbance zone before seismic surveying begins.

- Visually monitor the disturbance zone and adjacent waters for sea otters for at least 30 minutes before initiating ramp-up procedures. If no sea otters are detected, you may initiate ramp-up procedures. Do not initiate ramp-up procedures at night or when you cannot visually monitor the disturbance zone for marine mammals.
- Initiate ramp-up procedures by firing a single airgun. The preferred airgun to begin with should be the smallest airgun, in terms of energy output (dB) and volume (cubic inches).
- Continue Ramp-up by gradually activating additional airguns over a period of at least 20 minutes, but no longer than 40 minutes, until the desired operating level of the airgun array is obtained.

Powerdown and Shutdown

Immediately power down or shutdown the seismic source array and/or other acoustic sources whenever one or more sea otters are sighted close to or within the area delineated by the 190 dB disturbance zone. If the power down operation cannot reduce the received sound pressure level to 160 dB or less, the operator must immediately shut down the seismic airgun array and/or other acoustic sources.

Emergency Shutdown

If observations are made or credible reports are received that one or more sea otters are within the area of the seismic survey and are indicating acute distress, such as any injury due to seismic noise, the seismic airgun array will be immediately shutdown and the Service contacted. The airgun array will not be restarted until review and approval by the Service.

Drill Rig Tow

Because the ocean tugs will be under tow while they are generating noises of concern they will be traveling at very slow speeds (1 to 5 knots), providing sufficient time for marine mammals to move from the vicinity and avoid any possible injury take due to collision or noises exceeding injury thresholds. Altering courses or speeds to avoid harassment takes will be conducted when feasible, but completely shutting engines down would represent a major (and perhaps illegal) safety concern given the inherent hazards of towing at sea. Thus, while marine mammals will be monitored, no safety shutdowns will occur; however, marine mammal monitoring will occur during all tow events.

Drive Pipe Driving

Soon after the drill rig is positioned on the well head, the conductor pipe will be driven as the first stage of the drilling operation. At least two marine mammal observers (one operating at a time) will be stationed aboard the rig during this 2 to 3 day operation monitoring a 1.6-km (1-mi) shutdown safety zone. The impact hammer operator will be notified to shutdown hammering operations at the approach of a marine mammal to the safety zone. Also, a ramp up of the hammering will begin at the start of each hammering session. The ramp up procedure involves initially starting with three soft strikes, 30 seconds apart. This delayed-strike start alerts marine mammals of the pending hammering activity and provides them time to vacate the area. Monitoring will occur during all hammering sessions.

Rig Operation

Hydroacoustic tests were conducted by MAI (2011) on the *Spartan 151* in 2011. The results indicated that the lattice legs of the drill rig were preventing significant noise from entering the water column. The MAI (2011) found that underwater noise levels associated with drilling did not exceed ambient, while the large power generators onboard the rig produced noise that exceeded 120 dB only out about 50 m. Noise associated with drilling and general operation of the drill rig is of little concern to marine mammals.

VSP Operations

As with the CPD, marine mammal observers will be redeployed during the VSP operations to monitor a shutdown safety zone. Illingworth & Rodkin (2014) measured noise levels during VSP operations associated with BlueCrest post-drilling operations at the Cosmopolitan State #B–1 site during July 2013. The results indicated that the 720-in^3 airgun array used during the operation produced noise levels exceeding 160 dB out to a distance of approximately 2.47 km (1.54 mi). Thus, all VSP monitoring will involve a 2.5-km (1.55-mi) shutdown zone. The airgun operator will be notified to shut down firing of the guns at the approach of a marine mammal to the safety zone. Also, a "soft start" ramp up of the guns will begin at the start of each airgun session.

Sea Otter Observers

The initial rig tow from Port Graham to Cosmopolitan #B–1 is expected to last less than 12 hours. A single observer will monitor for sea otters during the tow. If the rig is towed from an upper Cook Inlet location, and is expected to last more than 12 hours (which it is), then two observers, working alternate shifts, will be used.

Pipe driving is expected to take 2 to 3 days to complete. Two sea otter observers, working alternate shifts, will be stationed aboard the drill rig during all pipe driving activities at the well. The observers will operate from a station as close to the well head as safely possible.

As with the pipe driving, two observers will monitor all VSP activities. Monitoring during zero-offset VSP will be conducted by two sea otter observers operating from the drill rig. During walk-away VSP operations, an additional two sea otter observers will monitor from the seismic source vessel.

Only trained sea otter observers will be used during this project. All observers will either have previous experience monitoring for sea otters, or will go through a sea otter (marine mammal) monitoring training course. Less-experienced observers will be paired with veterans. Observers will also be provided with field guides, instructional handbooks, and a contacts list to assist in assuring data are collected effectively and accurately.

Notification of Injured or Dead Sea Otter

In the unexpected event that the specified activity clearly causes the take of a sea otter in a manner not authorized by the IHA (if issued), such as a serious injury or mortality (*e.g.*, ship-strike), BlueCrest would immediately report the incident to the Service. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.*, wind speed and direction, cloud cover, and visibility);
- Description of all sea otter observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

In the event that BlueCrest discovers an injured or dead sea otter, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), BlueCrest would report the incident to the Service within 24 hours of the discovery. BlueCrest would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS, FWS, and the Marine Mammal Stranding Network.

Maintaining Safe Radii

Acoustical injury to sea otters can occur if received noise levels exceed 190 dB. BlueCrest is not requesting authorization of these takes, termed Level A injury takes, but instead will implement mitigation measures to avoid these takes, including shutdown safety zones. However, the rig towing procedures to be used during BlueCrest's operation do not have the potential to acoustically injure sea otters. Therefore, no shutdown safety zones will be established for this activity. The pipe driving and VSP operations do generate impulsive noises exceeding 190 dB. Based on the estimated distances to the 190 dB isopleth addressed above, a 170-m (560-ft) shutdown safety zone will be established and monitored during pipe driving, while a 240-m (787-ft) shutdown safety zone will be monitored during VSP operations. These safety zones are conservative for sea otters given that injury take is not expected until noise levels reach 190 dB.

Monitoring and Reporting Requirements

We require holders of an IHA to cooperate with the Service and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration activities on sea otters. In this case, BlueCrest coordinated with NMFS, Bureau of Safety and Environmental Enforcement, and the Army Corps of Engineers. BlueCrest reached out to the communities of Homer, Port Graham, Kenai, Seldovia, Soldotna, and Ninilchik, as well as Kenai Peninsula Borough, Cook Inlet Region, Inc., Cook Inlet Keeper, United Cook Inlet Drift Association, and the Chugach Alaska Services.

BlueCrest must submit a final report to the Service within 90 days after the end of the project. The report must describe the operations that were conducted and the marine mammals that were observed. The report must include documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report must summarize the dates and locations of seismic operations, and all sea otter sightings (dates, times, locations, activities, associated seismic survey activities, sea otter behavior, and any observed behavioral changes). All observations of sea otters, including any observed reactions to the seismic operations, will be recorded and reported to the Service.

Monitoring Requirements

Holders of an IHA will be required to:

- Maintain trained and qualified onsite observers to carry out monitoring programs for sea otters necessary for initiating adaptive mitigation responses.
- Place trained and qualified observers on board all operational and support vessels to alert crew of the presence of sea otters to initiate adaptive mitigation responses and to carry out specified monitoring activities identified in the monitoring and mitigation plan necessary to evaluate the impact of authorized activities on sea otters and the subsistence use of sea otters.
- Cooperate with the Service and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration activities on sea otters.

The wet-tow will most likely occur during the summer when Alaska days are long. However, because there are no injury-take concerns with the wet-tows, and only a very low potential for acoustical harassment, no special considerations will be made to monitor during poor visibility conditions. The CPD and VSP activities will be limited to daylight hours, and when sea conditions are light, therefore, when marine mammal observation conditions will be generally good.

Standard marine mammal observing field equipment will be used including reticule binoculars (10 × 42), big-eye binoculars (30×), inclinometers, and range-finders. Because rig-towing, CPD, and VSP will be limited to daylight hours, no special equipment such as night scopes or FLIRS (forward looking infra-red thermal imagery system) will be needed.

All location, weather, and marine mammal observation data will be recorded onto a standard field form. Global positioning system and weather data will be collected at the beginning and end of a marine mammal monitoring period and at every half-hour in between. Position data will also be recorded at the change of an observer or the sighting of a marine mammal. Enough position data will be collected to eventually map an accurate charting of any vessel travel. Recorded marine mammal data will also include species, group size, behavior, and any apparent reactions to the project activities. Any behavior that could be construed as a take will also be recorded in the notes.

Reporting Requirements

Holders of an IHA must keep the Service informed on the progress of authorized activities by:

- Notifying the Service at least 48 hours prior to the onset of activities.
- Providing weekly progress reports of authorized activities, noting any significant changes in operating state and or location.
- Notifying the Service within 48 hours of ending activity.

Weekly Observation Reports

Holders of an IHA must report, on a weekly basis, observations of sea otters during project activities. Information within the observation report will include, but is not limited to:

- Date, time, and location of each sighting.

- Number, sex, and age (if determinable).
- Observer name, company name, vessel name or aircraft number, letter of authorization number, and contact information.
- Weather, visibility, and sea conditions at the time of observation.
- Estimated distance from the animal or group when initially sighted, at closest approach, and end of the encounter.
- Industry activity at time of sighting and throughout the encounter. If a seismic survey, record the estimated ensonification zone where animals are observed.
- Behavior of animals at initial sighting, any change in behavior during the observation period, and distance from Industry activity associated with those behavioral changes.
- Detailed description of the encounter.
- Duration of the encounter.
- Duration of any behavioral response (*e.g.*, diving, swimming, splashing, etc.).
- Mitigation actions taken.

Activity reports will be submitted to the Service within 72 hours of completing each of the three activities (rig tow, pipe driving, and VSP).

Monthly Observation Reports

The monthly report will contain and summarize the following information pertaining to sea otters as appropriate:

- Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort Sea state and wind force), and associated activities during all seismic operations and marine mammal sightings.
- Species, number, location, distance from the vessel, and behavior of any sighted marine mammals, as well as associated seismic activity (number of power-downs and shutdowns), observed throughout all monitoring activities.
- A description of the implementation and effectiveness of the mitigation measures of the IHA.

After-Action Monitoring Reports

The results of monitoring efforts identified in the 4MP must be submitted to the Service for review within 90 days of the expiration date of the IHA.

The report must include, but is not limited to, the following information:

- A summary of monitoring effort including: Total hours, areas/distances, and distribution of sea otters through the project area of each rig, vessel, and aircraft.
- Analysis of factors affecting the visibility and detectability of sea otters by specified monitoring.
- Analysis of the distribution, abundance, and behavior of sea otter sightings in relation to date, location, sea conditions, and operational state.
- Estimates of take based on the number of animals encountered/km of vessel and aircraft operations by behavioral response (no response, moved away, dove, etc.), and animals encountered per day by behavioral response for stationary drilling operations.
- Raw data in electronic format (*i.e.*, Excel spreadsheet) as specified by the Service in consultation with Industry representatives.
- Sighting rates of sea otters during periods with and without airgun activities (and other variables that could affect detectability).
- Initial sighting distances versus airgun activity state (firing, powered down, or shut-down).
- Closest point of approach versus airgun activity state.
- Observed behaviors and types of movements versus airgun activity state.
- Numbers of sightings/individuals seen versus airgun activity state.

Findings

The Service proposes the following findings regarding this action:

Small Numbers Determination and Estimated Take by Incidental Harassment

For small take analysis, the statute and legislative history do not expressly require a specific type of numerical analysis, leaving the determination of "small" to the agency's discretion. Factors considered in our small numbers determination include the following:

(1) *The number of northern sea otters inhabiting the proposed impact area is small relative to the size of the northern sea otter population.* The potential exposures for the 2016 drilling period, based on otter density, is estimated to be 388 sea otters, or about 2.1 percent of the stock. Taking into account that 15 percent of the sea otters are likely to dive while in the vicinity of the drill rig, the estimated number of exposures reduces to 58. However, because sea otter behavior is difficult to predict, the more conservative 388 sea otters potentially exposed is the requested authorization. This is approximately 2 percent of the estimated population size of 18,297 (USFWS 2014).

(2) *The area where the proposed activities would occur is a relatively small fraction of the available habitat of the Southcentral Alaska stock of northern sea otters.* Since sea otters typically inhabit nearshore marine areas, shoreline length is a readily available metric that can be used to quantify sea otter habitat. The total length of shoreline within the range of the Southcentral Alaska stock of northern sea otters is approximately 2,575 km (1,600 mi), of which 540 km (335.5 mi) are located within Cook Inlet. Of that, the total length of shoreline for the proposed activities is approximately 60 km (37.3 mi), which is a small percentage of the total shoreline habitat available to the Southcentral sea otter stock. Any potential impacts to prey caused by the proposed activities would occur in the limited area of the shoreline habitat.

(3) *Monitoring requirements and mitigation measures are expected to limit the number of incidental takes.* Level A harassment (harassment that has the potential to injure sea otters) is not authorized. If a sea otter was observed within or approaching the 190 dB exposure area of the various gun arrays, avoidance measures would be taken, such as decreasing the speed of the vessel and/or implementing a power down or shutdown of the airguns. Power-up and ramp-up procedures would prevent Level A harassment and limit the number of incidental takes by Level B harassment by affording time for sea otters to leave the area. Monitoring and mitigation measures are thus expected to prevent any Level A harassment and to minimize Level B harassment. Further, monitoring and reporting of sea otter activity in proximity to activities will allow the Service to reanalyze and possibly refine and adjust future take estimates as exploration activities continue in sea otter habitat into the future.

The mitigation measures outlined above are intended to minimize the number of sea otters that may be disturbed by the proposed activity. Any impacts on individuals are expected to be limited to Level B harassment and to be of short-term duration. No take by injury or death is anticipated or authorized. Should the Service determine, based on the monitoring and reporting to be conducted throughout the survey activities, that the effects are greater than anticipated, the authorization may be modified, suspended, or revoked.

Negligible Impact

The Service finds that any incidental "take by harassment" that may result from this proposed seismic survey cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival, and would, therefore, have no more than a negligible impact on the stock. In making this finding, we considered the best available scientific information, including: (1) The biological and behavioral characteristics of the species; (2) the most recent information on distribution and abundance of sea otters within the area of the proposed activity; (3) the potential sources of short-term disturbance during the proposed activity; and (4) the potential response of sea otters to this short-term disturbance. In addition, we conducted a thorough review of material supplied by the applicants, information from other operators in Cook Inlet, our files and datasets, data acquired from NMFS, and published reference materials. We also consulted with other sea otter experts in the Cook Inlet area, including the Service and NMFS researchers and local residents.

Limited evidence (Riedman 1983, 1984) suggests that sea otters are not particularly sensitive to or adversely affected by sound. Responses of sea otters to disturbance would most likely be diving and/or swimming away from the sound source, which may entail the temporary, but not sustained, interruption of foraging, breeding, resting, or other natural behaviors. Thus, although 388 sea otters (around 2 percent of the population) are estimated to be potentially taken (*i.e.*, potentially disturbed) by Level B harassment by means of exposure to sound levels of 160 dB or greater but less than 190 dB for the duration of the project, we do not expect that this type of harassment would result in adverse effects on the species or stock through effects on annual rates of recruitment or survival.

Our finding of negligible impact applies to incidental take associated with the proposed activities as mitigated through this authorization process. This authorization establishes monitoring and reporting requirements to evaluate the potential impacts of the proposed activities, as well as mitigation measures designed to minimize interactions with, and impacts to, sea otters.

Impact on Subsistence

We find that the anticipated harassment caused by the proposed activities would not have an unmitigable adverse impact on the availability of sea otters for taking for subsistence uses. In making this finding, we considered the timing and location of the proposed activities and the timing and location of subsistence harvest activities and patterns, as reported through the MTRP, in the proposed project area, as well as the applicants' consultation with potentially affected subsistence communities. More information can be found on our Web site at *http://www.fws.gov/alaska/fisheries/mmm/iha.htm.*

The Service finds that the proposed activities will have a negligible impact on small numbers of sea otters in Southcentral Alaska and will not have an unmitigable adverse impact on the availability of the stock for subsistence uses. Further, we have prescribed permissible methods of take, means to have the least practicable impact on the stock and its habitat, and monitoring requirements.

Required Determinations

National Environmental Policy Act (NEPA)

We have prepared a draft Environmental Assessment (EA) (see Public Comments above) in accordance with the NEPA (42 U.S.C. 4321 *et seq.*). We have preliminarily concluded that approval and issuance of this authorization for the nonlethal, incidental, unintentional take by Level B harassment of small numbers of northern sea otters in the Southcentral Alaska stock during oil and gas industry exploration activities in the lower Cook Inlet of Alaska would not significantly affect the quality of the human environment, and that the preparation of Environmental Impact Statements on these actions is not required by section 102(2) of the NEPA or its implementing regulations.

Endangered Species Act

Oil and gas exploration in U.S. waters is authorized by The Bureau of Ocean Energy Management, Regulation and Enforcement. All Federal agencies are required to ensure the actions they authorize are not likely to jeopardize the continued existence of any threatened or endangered species or result in destruction or adverse modification of critical habitat. The proposed oil and gas activities will occur entirely within the range of the Southcentral Alaska stock of the northern sea otter, which is not listed as threatened or endangered under the ESA. Though it is not a focal species subject to the issuance of this IHA, it is worth noting that the federally listed threatened Steller's eiders (*Polysticta stelleri*) have molting and wintering range that includes the Cook Inlet. However, during the time period of the proposed project, it is highly unlikely that any Steller's eider will be present in the action area. Additionally, even in the unlikely event that a Steller's eider is present; the issuance of an IHA for BlueCrest's proposed seismic surveys will not have any impact on the species. Thus, the Service's proposed issuance of an IHA will have no effect on Steller's eiders and no additional ESA consultation will be necessary.

Government-to-Government Relations With Native American Tribal Governments

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, Department of the Interior Secretarial Order 3225 of January 19, 2001 (Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)), Department of the Interior Secretarial Order 3317 of December 1, 2011 (Tribal Consultation and Policy), Department of the Interior Memorandum of January 18, 2001 (Alaska Government-to-Government Policy), the Department of the Interior's manual at 512 DM 2, and the Native American Policy of the U.S. Fish and Wildlife Service, January 20, 2016, we readily acknowledge our responsibility to communicate and work directly on a Government-to-Government basis with federally recognized Alaska Natives Tribes in developing programs for healthy ecosystems, to seek their full and meaningful participation in evaluating and addressing conservation concerns for listed species, to remain sensitive to Alaska Native culture, and to make information available to Alaska Natives.

Furthermore, and in accordance with Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act of 1971 (ANCSA) Corporations, August 10, 2012, we likewise acknowledge our responsibility to communicate and work directly with ANCSA Corporations in evaluating and addressing conservation concerns for listed species, to remain sensitive to Alaska Native culture, and to make information available to ANSCA Corporations. We have evaluated possible effects on federally recognized Alaska Native Tribes. Through the IHA process identified in the MMPA, Industry presents a communication process, culminating in a Plan of Cooperation (POC), if warranted, with the Native communities most likely to be affected and engages these communities in numerous informational meetings.

Through various interactions and partnerships, we have determined that the issuance of this IHA is appropriate. We are open to discussing ways to continually improve our coordination and information exchange, including through the IHA/POC process, as may be requested by Tribes or other Native groups.

Proposed Authorization

The Service proposes to issue BlueCrest an IHA for the nonlethal, incidental, unintentional take by Level B harassment of small numbers of northern sea otters (*Enhydra lutris kenyoni*) in the Southcentral Alaska stock during industry exploration activities in the lower Cook Inlet of Alaska, as described in this document and in their petition. We neither anticipate nor propose authorization for take by injury or death. The final IHA would be effective immediately after the date of issuance through October 31, 2016.

The final IHA will also incorporate the mitigation, monitoring, and reporting requirements described in this proposal. The applicant will be expected and required to implement and fully comply with those requirements. The IHA will not authorize the intentional take of northern sea otters, nor take by injury or death.

If the nature or level of activity changes or exceeds that described in this proposal and in the IHA petition, or the nature or level of take exceeds that projected in this proposal, the Service will reevaluate its findings. The Secretary may modify, suspend, or revoke this authorization if the findings are not accurate or the mitigation, monitoring, and reporting requirements described herein are not being met.

Karen P. Clark,

Acting Regional Director, Alaska Region.

[FR Doc. 2016–11426 Filed 5–12–16; 8:45 am]

BILLING CODE 4333–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2016–N020; FXES11120200000F2–167–FF02ENEH00]

Final Environmental Impact Statement and Draft Record of Decision for the Final Pima County Multi-Species Habitat Conservation Plan, Pima County, Arizona

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the final environmental impact statement (EIS) and related draft record of decision (ROD) for the Pima County Multi-Species Conservation Plan (MSCP). The final EIS was updated to address the comments received on the 2012 draft EIS and considers the environmental effects of issuing an incidental take permit (ITP) for covered activities on the covered species. The ITP will be in effect for a period of 30 years. Pima County has prepared the final Pima County MSCP to describe and implement a conservation plan that will minimize and mitigate environmental effects associated with the incidental take of seven animal species and impacts to two plant species currently listed under the Endangered Species Act of 1973, as amended (Act), as well as impacts to 35 species that may become listed under the Act. The incidental take and other impacts would occur in Pima County and the adjacent counties of Cochise, Santa Cruz, and Pinal, Arizona, as a result of specific actions conducted under the authority of Pima County (covered activities).

DATES: The Record of Decision will become effective no sooner than 30 days after the publication date of this notice of availability for the final EIS.

ADDRESSES: *Obtaining Documents:* You may download copies of the final EIS, draft ROD, and final MSCP from the Arizona Ecological Services Office Web site at *http://www.fws.gov/southwest/es/arizona*. Alternatively, you may use one of the methods below to request a CD–ROM of the documents. Please send your requests or comments by any one of the following methods.

- *U.S. Mail:* Field Supervisor, Arizona Ecological Services Office, U.S. Fish and Wildlife Service, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.
- *In-Person Drop Off, Viewing, or Pickup:* Telephone 520–670–6150 x 242 (Scott Richardson) to make an appointment during regular business hours (8 a.m. to 4 p.m.) to drop off comments or view documents at the Arizona Ecological Services, Tucson Sub-Office, 201 North Bonita Avenue, Suite 141, Tucson, AZ 85745.
- *Fax:* Arizona Ecological Services, Tucson Sub-Office; Fax Number 520–670–6155.

FOR FURTHER INFORMATION CONTACT: Scott Richardson, by U.S. mail at the Arizona Ecological Services Office, Tucson Sub-Office, 201 North Bonita Avenue, Suite 141, Tucson, AZ 85745; by telephone at 520–670–6150 extension 242; or by email at *scott_richardson@fws.gov.*

SUPPLEMENTARY INFORMATION: Under NEPA, we advise the public of the following:

1. We have gathered the information necessary to determine the impacts and to formulate the alternatives for the final EIS related to the issuance of an ITP to Pima County; and

2. Pima County has developed a final habitat conservation plan—the Pima County MSCP—which describes the measures Pima County has agreed to implement to minimize and mitigate the effects of the proposed incidental take of federally listed species and unlisted covered species, to the maximum extent practicable, pursuant to Section 10(a)(1)(B) of the Endangered Species Act (16 U.S.C. 1531 *et seq.;* Act).

The 30-year ITP authorizes the incidental take of 40 animal species. Among the 40 animal species are 7 species currently listed under the Act:

- Lesser long-nosed bat (*Leptonycteris curasoae yerbabuenae*)
- Southwestern willow flycatcher (*Empidonax traillii extimus*)
- Yellow-billed cuckoo (*Coccyzus americanus;* western distinct population segment)
- Northern Mexican gartersnake (*Thamnophis eques megalops*)
- Chiricahua leopard frog (*Lithobates chiricahuensis*)
- Gila topminnow (*Poeciliopsis occidentalis occidentalis*)
- Gila chub (*Gila intermedia*)

The 40 animal species also include 33 species not currently listed under the Act:

- Mexican long-tongued bat (*Choeronycteris mexicana*)
- Western red bat (*Lasiurus blossevillii*)
- Western yellow bat (*Lasiurus xanthinus*)
- California leaf-nosed bat (*Macrotus californicus*)
- Pale Townsend's big-eared bat (*Corynorhinus townsendii pallescens*)
- Merriam's mouse (*Peromyscus merriami*)
- Western Burrowing owl (*Athene cunicularia hypugaea*)
- Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*)
- Rufous-winged sparrow (*Aimophila carpalis*)
- Swainson's hawk (*Buteo swainsoni*)
- Abert's towhee (*Melozone aberti*)
- Arizona Bell's vireo (*Vireo bellii arizonae*)
- Sonoran desert tortoise (*Gopherus morafkai*)
- Desert box turtle (*Terrapene ornata luteola*)
- Tucson shovel-nosed snake (*Chionactis occipitalis klauberi*)
- Groundsnake (valley form) (*Sonora semiannulata*)
- Giant spotted whiptail (*Aspidoscelis stictogramma*)
- Lowland leopard frog (*Lithobates yavapaiensis*)
- Longfin dace (*Agosia chrysogaster*)
- Desert sucker (*Catostomus clarki*)
- Sonora sucker (*Catostomus insignis*)

- San Xavier talussnail (*Sonorella eremita*)
- Black Mountain/Papago talussnail (*Sonorella ambigua*)
- Total Wreck talussnail (*Sonorella imperatrix*)
- Empire Mountain talussnail (*Sonorella imperialis*)
- Sonoran talussnail (*Sonorella magdalenensis* syn. *tumamocensis*)
- Pungent talussnail (*Sonorella odorata*)
- Santa Rita talussnail (*Sonorella walkeri*)
- Posta Quemada talussnail (*Sonorella rinconensis*)
- Santa Catalina talussnail subspecies (*Sonorella sabinoensis buehmanensis*)
- Santa Catalina talussnail subspecies (*Sonorella sabinoensis tucsonica*)
- Las Guijas talussnail (*Sonorella sitiens*)
- Tortolita talussnail (*Sonorella tortillita*)

Although take of listed plant species is not prohibited under the Act, plant species may be included in a habitat conservation plan to formally document the conservation benefits provided to them through that process. Pima County proposes four plant species for coverage under their MSCP, including two listed species:

- Huachuca water umbel (*Lilaeopsis schaffneriana* ssp. *recurva*)
- Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*)

And the two following unlisted species:

- Needle-spined pineapple cactus (*Echinomastus erectocentrus* var. *erectocentrus*)
- Tumamoc globeberry (*Tumamoca macdougalii*)

The proposed incidental take would primarily occur within Pima County, Arizona, although some Pima County actions may also occur in adjacent counties as a result of impacts from actions occurring under the authority of the applicants. The applicants have completed a final habitat conservation plan as part of the application package, as required by the Act.

The final EIS considers the direct, indirect, and cumulative effects of the proposed action of permit issuance, including the measures that will be implemented to minimize and mitigate such impacts.

Background

Over the past 50 years, Pima County, Arizona, has had one of the fastest growing human populations of any county in the United States (an increase of just under 500 percent), as a result of a sunny climate, natural beauty, and economic opportunities. Urban growth has resulted in significant development, which is expected to continue in the foreseeable future. A significant proportion of the predicted future development in unincorporated Pima County is anticipated to occur in the undeveloped or underdeveloped areas, particularly in the eastern portion of the county.

The presence of threatened and endangered species in the areas of potential land development creates regulatory concerns in Pima County. Interest in conservation and its potential related costs is found across many segments of the community, ranging from environmental advocates promoting strengthened protections to members of the business community, the development industry, and real estate profession, all of whom may be concerned about potential economic impacts. Landowners and private property interests are concerned about how their land-use decisions potentially can be affected by the presence of federally listed threatened and endangered species.

A long-term solution to ensure compliance with the Act, particularly in areas such as Pima County where there is a large number of listed and unlisted species, is to develop a habitat conservation plan, such as the MSCP, under section 10(a)(1)(B) of the Act. The Pima County MSCP proposes a combination of long-term and short-term actions and long-range planning to protect and enhance some areas of the natural environment within Pima County. The Pima County MSCP would help guide public investments in both infrastructure and conservation, as well as establish Pima County's preferences for the expenditure of funds to preserve and reduce the threats posed by urbanization to species and their habitats, using tools such as ranch conservation and open space programs. Through the MSCP and the ITP, Pima County commits to a series of measures that will avoid, minimize, and mitigate impacts of covered activities on the covered species.

The objective of the Pima County MSCP is to achieve a balance between:

- Long-term conservation of the diversity of natural vegetation communities and native species of plants and animals that make up an important part of the natural heritage and allure of Pima County; and
- The orderly use of land to promote a sustainable economy, health, well-being, customs, and culture of the growing population of Pima County.

In addition, the Pima County MSCP has been designed to:

- Avoid, minimize, and mitigate for the impacts of activities that would result in take of threatened and endangered species and provide long-term management and monitoring programs to help ensure program effectiveness;
- Meet the requirements for the applicants to receive an ITP— pursuant to section 10(a)(1)(B) of the Act— that would allow for the incidental take of threatened and endangered species while engaging in otherwise lawful activities;
- Provide conservation benefits to species and ecosystems in Pima County that would not otherwise occur without the MSCP;
- Maximize flexibility and available options in developing mitigation and conservation programs;
- Minimize uncoordinated decision making, which can result in incremental habitat loss and inefficient project review;
- Provide a decision-making framework that minimizes habitat loss and maximizes the efficiency of public-sector projects;
- Provide the applicants and their community stakeholders (participants) with long-term planning assurances;
- Cover an appropriate range of activities under the permit;
- Reduce the regulatory burden of compliance with the Act for the applicants and all affected participants; and
- Designate the funding that would be available to implement the Pima County MSCP over the entirety of its proposed term.

The Service prepared the final EIS to respond to Pima County's request for an ITP for the proposed covered species related to activities that have the potential to result in incidental take. The need for this action is based on the potential for activities proposed by the applicants on lands under their jurisdiction to result in incidental take of covered species, thus requiring an ITP because section 9 of the Act prohibits the "taking" of threatened and endangered species. We are authorized, however, under limited circumstances, to issue permits to take federally listed species, when such a taking is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered and threatened species are in the Code of Federal Regulations at 50 CFR 17.22 and 17.32, respectively.

To identify the scope and content of the draft EIS for the MSCP, the Service formally initiated the scoping process on September 7, 2000, with the publication in the **Federal Register** (65

FR 54295) of the notice of intent to prepare an EIS. Public involvement meetings were held in the form of open house/informational meetings in October, November, and December of 2000. In addition, a public scoping meeting was held in October 2003 prior to the release of an early draft MSCP. This meeting was preceded by the publication in the **Federal Register** (68 FR 53748) of a second notice of intent to prepare an EIS. Subsequent drafts of the MSCP were published in 2005, 2006 (two versions), 2008, and 2009 as part of the extensive process of developing scientific information and inviting public review and comment.

A notice of availability and notice of public meetings for the draft MSCP and EIS were posted in the **Federal Register** on December 7, 2012 (77 FR 73045). We also posted the notice of availability, draft MSCP, and draft EIS on the Arizona Ecological Services Web site (*http://www.fws.gov/southwest/es/arizona/HCPs.htm*). The formal comment period for the Pima County Draft MSCP/Draft EIS was from December 7, 2012, through March 15, 2013. Pima County hosted five public meetings for the draft MSCP in January 2013. The Service held one public comment meeting for the EIS on February 21, 2013, in Tucson, Arizona.

During the public comment period, including the six public meetings as described above, 20 letters and written comments were received. Of the comments received during the draft MSCP/draft EIS public comment review period, the topics of primary concern were the planning and decision making process, natural resources management, social and economic concerns, cumulative effects, and MSCP-specific issues. Detailed information concerning public involvement and a record of comments received during scoping and public comment periods, and Service responses, are provided in Chapter 6 of the final EIS.

Revisions were made to the draft MSCP and draft EIS based on public comments. The Service has afforded government agencies, tribes, and the public extensive opportunity to participate in the preparation of the EIS. We have requested data, comments, new information, and suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party regarding the draft EIS and draft MSCP. We have considered these comments in completing the final EIS, working with Pima County to finalize the MSCP, and developing the ITP.

Authority

We provide this notice under Section 10(c) of the Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22 and 17.32), and NEPA (42 U.S.C. 4371 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region, Albuquerque, New Mexico.

[FR Doc. 2016–10948 Filed 5–12–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2016–N083; FXES11120200000–167–FF02ENEH00]

Receipt of Incidental Take Permit Applications for Participation in the Amended Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for public comments.

SUMMARY: Under the Endangered Species Act, as amended (Act), we, the U.S. Fish and Wildlife Service, invite the public to comment on incidental take permit applications for take of the federally listed American burying beetle resulting from activities associated with the geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure within Oklahoma. If approved, the permits would be issued under the approved *Amended Oil and Gas Industry Conservation Plan Associated with Issuance of Endangered Species Act Section 10(a)(1)(B) Permits for the American Burying Beetle in Oklahoma* (ICP).

DATES: To ensure consideration, written comments must be received on or before June 13, 2016.

ADDRESSES: You may obtain copies of all documents and submit comments on the applicant's ITP application by one of the following methods. Please refer to the permit number when requesting documents or submitting comments.

○ *U.S. Mail:* U.S. Fish and Wildlife Service, Division of Endangered Species—HCP Permits, P.O. Box 1306, Room 6034, Albuquerque, NM 87103.

○ *Electronically: fw2_hcp_permits@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Marty Tuegel, Branch Chief, by U.S. mail at: U.S. Fish and Wildlife Service, Environmental Review Division, P.O. Box 1306, Room 6034, Albuquerque, NM 87103; or by telephone at 505–248–6651.

SUPPLEMENTARY INFORMATION:

Introduction

Under the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*; Act), we, the U.S. Fish and Wildlife Service, invite the public to comment on incidental take permit (ITP) applications for take of the federally listed American burying beetle (*Nicrophorus americanus*) resulting from activities associated with geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma. If approved, the permit would be issued to the applicant under the *Amended Oil and Gas Industry Conservation Plan Associated with Issuance of Endangered Species Act Section 10(a)(1)(B) Permits for the American Burying Beetle in Oklahoma* (ICP). The original ICP was approved on May 21, 2014 (publication of the FONSI notice was on July 25, 2014; 79 FR 43504). The draft amended ICP was made available for comment on March 8, 2016 (81 FR 12113), and approved on April 13, 2016. The ICP and the associated environmental assessment/finding of no significant impact are available on the Web site at *http://www.fws.gov/southwest/es/oklahoma/ABBICP*. However, we are no longer taking comments on these finalized, approved documents.

Applications Available for Review and Comment

We invite local, State, Tribal, and Federal agencies, and the public to comment on the following application under the ICP, for incidental take of the federally listed ABB. Please refer to the appropriate permit number (*e.g.*, TE–123456) when requesting application documents and when submitting comments. Documents and other information the applicants have submitted with this application are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit TE48815B

Applicant: Enbridge Energy, Limited Partnership, Duluth, MN.

Applicant requests an amended permit for oil and gas upstream and midstream production, including geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma.

Permit TE49745B

Applicant: PetroQuest Energy, LLC, Tulsa, OK.

Applicant requests an amended permit for oil and gas upstream and midstream production, including geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma.

Permit TE60264B

Applicant: Phillips 66 Pipeline Co., Houston, TX.

Applicant requests an amended permit for oil and gas upstream and midstream production, including geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma.

Permit TE48815B

Applicant: Enbridge Energy, Limited Partnership, Duluth, MN.

Applicant requests an amended permit for oil and gas upstream and midstream production, including geophysical exploration (seismic) and construction, maintenance, operation, repair, and decommissioning of oil and gas well field infrastructure, as well as construction, maintenance, operation, repair, decommissioning, and reclamation of oil and gas gathering, transmission, and distribution pipeline infrastructure within Oklahoma.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

We provide this notice under section 10(c) of the Act (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.22) and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1506.6).

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region.

[FR Doc. 2016–11333 Filed 5–12–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF INTERIOR

Bureau of Indian Affairs

[167 A2100DD/AADD001000/ A0A501010.999900]

Indian Land Consolidation Lien Removal and Acquisition Fund Disposition

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of tribal consultation.

SUMMARY: This notice announces that the Department of the Interior (Department) is hosting a tribal consultation session regarding lien removal and Acquisition Fund disposition under the Indian Land Consolidation Program (ILCP).

DATES: The tribal consultation session will be held Thursday, June 9, 2016, from 9 a.m. to 12 p.m. Written comments must be received by June 17, 2016.

ADDRESSES: The tribal consultation session will be held in the Little Crow Room at Mystic Lake Casino-Hotel, 2400 Mystic Lake Blvd. NW., Prior Lake, MN 55372. Please address written comments to *consultation@bia.gov* or to: ILCP Waiver Comments, 1849 C Street NW., MS 3643, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth K. Appel, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680, *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION: Several tribes own interests in trust land that are subject to a lien held by the Department under the Indian Land Consolidation Act (Act). These tribes had participated in the ILCP to acquire individually owned interests and consolidate them into tribal ownership. The ILCP is no longer in operation, but the liens remain, and the revenue proceeds continue accruing to the Acquisition Fund. Likewise, funds remain in Acquisition Fund depository accounts. The Department seeks to consult with those Tribes that have ILCP liens and requests their input on its proposal to: (1) Remove existing liens on revenue accruing from land interests that tribes have purchased under the ILCP, and (2) dispose of the proceeds on deposit remaining in the Acquisition Fund by transferring the funds (segregated by tribe) to each impacted tribe's trust account, to be used by the tribe to purchase additional on-reservation fractionated interests in parcels.

Dated: May 5, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2016–11286 Filed 5–12–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[167A2100DD/AAKC001030/ A0A501010.999900]

Proposed Finding Against Acknowledgment of the Georgia Tribe of Eastern Cherokee, Inc.

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of proposed finding.

SUMMARY: The Department of the Interior (Department) gives notice that the Acting Assistant Secretary—Indian Affairs (AS–IA) proposes to determine that the petitioner known as the Georgia Tribe of Eastern Cherokee, Inc. is not an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner has not submitted sufficient evidence to satisfy all seven of the criteria set forth in the applicable regulations and, therefore, does not meet the requirements for a government-to-government relationship with the United States.

DATES: Comments on this proposed finding (PF) are due on or before November 9, 2016.

ADDRESSES: Comments and requests for a copy of the summary evaluation of the evidence should be addressed to the Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, 1951 Constitution Avenue NW., Mail Stop 34B–SIB, Washington, DC 20240. Interested or informed parties who make submissions to the AS–IA must also provide copies of their comments to the petitioner at Georgia Tribe of Eastern Cherokee c/o Thomas Mote, P.O. Box 1411, Dahlonega, Georgia 30533.

FOR FURTHER INFORMATION CONTACT: Ms. Alycon T. Pierce, Acting Director, Office of Federal Acknowledgment, (202) 513–7650.

SUPPLEMENTARY INFORMATION: Pursuant to 25 CFR 83.10(h), the Department gives notice that the AS–IA proposes to determine that the Georgia Tribe of Eastern Cherokee (GTEC, Petitioner #41), c/o Thomas Mote, P.O. Box 1411, Dahlonega, Georgia 30533, is not an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioner does not satisfy all seven criteria in Part 83 of Title 25 of the Code of Federal Regulations (25 CFR part 83), specifically criteria 83.7(a), 83.7(b), and 83.7(c). Therefore, it does not meet the requirements for a government-to-government relationship with the United States.

The Department publishes this notice in the exercise of authority that the Secretary of the Interior delegated to the AS–IA by 209 DM 8. The Principal Deputy AS–IA assumed these duties as acting AS–IA on January 1, 2016.

On December 3, 1978, Chairman Thomas B. Mote, and nine board members of the "Georgia Tribe of Cherokees, Inc." signed resolution "No. 2–78" to apply for Federal acknowledgment. The Department received it on January 1, 1979, and designated GTEC as Petitioner #41. The petitioner submitted petition materials on February 5, 1980. The Department conducted an initial review of the petition on August 22, 1980, and issued a letter providing technical assistance (TA).

The petitioner claims to have evolved from the pre-Removal Cherokee Nation and to represent a specific Cherokee family that did not remove westward with the Tribe in the 19th century. The vast majority of the petitioner's members identify descent from Rachel Martin, a Cherokee woman, her husband Daniel Davis, and primarily their three children who remained near Dahlonega, Georgia, after the Cherokee Nation removed to Indian Territory in the 1830s. The petitioner also stated that the Cherokee who remained near Dahlonega "clustered around the Davis Plantation" and that the "Davis family played a central leadership role in the tribe." The petitioner claims to connect historically to the Cherokee Nation in Oklahoma more than to the Eastern Band of Cherokee Indians in North Carolina. The GTEC's petition narrative maintains that its ancestors were part of the Cherokee Nation into the early 20th century.

On August 10, 1998, Thomas B. Mote and other leaders of GTEC delivered the petitioner's response to the Department's 1980 letter and asked the Department to review the petition under the 1994 regulations. On January 19, 1999, the Department issued a TA review letter. The GTEC provided additional materials to the Department on February 14, 2002, September 11, 2006, and October 3, 2006, including a new membership list certified and dated September 1, 2006. On October 23, 2006, the Department placed GTEC (Petitioner #41) on the "Ready, Waiting for Active Consideration" list.

On May 31, 2013, the Department offered "ready" petitioners the option of suspending evaluation of their petitions as the Department was proposing to revise the acknowledgment regulations. On June 21, 2013, GTEC waived its option to suspend evaluation and elected "to proceed under the current standards and criteria."

In July 2014, the Office of Federal Acknowledgment (OFA) notified GTEC that its sampling of birth or similar records submitted in 2013 was insufficient for analysis, gave GTEC an additional 180 days to submit the necessary documentation, and noted that the evaluation team was diverted to another petition and litigation. As a result, the AS–IA found good cause to suspend active consideration under § 83.10(g) for 180 days to January 27, 2015, and extend active consideration under § 83.10(h) for up to 180 additional days, or until July 27, 2015. The OFA provided GTEC a list of members and ancestors lacking evidence demonstrating the child-to-parent link and a list of individuals with missing or incomplete addresses. Review of the GTEC petition was extended further until January 22, 2016, allowing the research team to make visits to the GTEC offices to review records and conduct interviews.

In response to a letter under § 83.7(b) of the current regulations, effective July 31, 2015, all members of GTEC's governing body requested evaluation of its petition under the 1994 regulations, declining the option to be evaluated under the current regulations. The projected January 22, 2016, date for issuing the proposed finding was subsequently extended to May 6, 2016. This evaluation is under the 1994 regulations as requested by the petitioner.

The evidence submitted by the GTEC petitioner and evidence Department staff obtained through its research does not meet three of the seven mandatory criteria for Federal acknowledgment: Criteria 83.7(a), 83.7(b), and 83.7(c). The petitioner has submitted evidence sufficient to meet: Criteria 83.7(d), 83.7(e), 83.7(f), and 83.7(g). In accordance with the regulations 25 CFR part 83, the failure to provide evidence sufficient to meet all seven criteria requires a proposed finding that the petitioning group is not an Indian tribe within the meaning of Federal law. An explanation of the Department's evaluation of each criterion follows below.

Criterion (a) requires that external observers have identified the petitioner as an American Indian entity on a substantially continuous basis since 1900. The records show the petitioner is a recently organized group almost entirely composed of descendants of the Davis family. There are no contemporary identifications of an Indian entity in Lumpkin County, although a few records identify individuals as Indian. Many of the documents submitted relate the Cherokee Nation's history leading up to and through the Removal Era in the 1830s and identify Cherokee individuals on various historical lists. There are few original, contemporary documents for 1900 to the present. This PF finds insufficient evidence of substantially continuous identifications of the GTEC petitioner from 1900 to the present. Therefore, the GTEC petitioner does not meet the requirements of criterion 83.7(a).

Criterion (b) requires that a predominant portion of the petitioning group comprise a distinct community from historical times to the present. The evidence demonstrates that petitioner's ancestors were active participants in Cherokee society before 1838. There is no evidence, however, that after the Cherokee Removal the petitioner's ancestors established a separate and distinct community of other Cherokee who did not remove, but remained in Georgia, and there is no evidence that they continued to participate in Cherokee society in Indian Territory. The Davises and their non-Indian neighbors lived together in a rural neighborhood, called Davis District, west of Dahlonega, Georgia. Only one of these families—"the Davises"—were Cherokee descendants and only their descendants are enrolled in GTEC. Therefore, the GTEC petitioner does not meet criterion 83.7(b).

Criterion (c) requires that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. The petitioner's ancestors were from a politically influential Cherokee family and part of a political network that advanced interests within the Cherokee Nation when it was in Georgia. After the Removal, the petitioner's ancestors—the Davis family in Georgia—did not establish an autonomous political organization composed of Cherokee who remained in Georgia, nor did they continue to participate in Cherokee political activities in Indian Territory. The petitioner submitted evidence dating between the 1880s and 1925 about the neighborhood church and school, but these institutions were not Indian institutions. Rather, they served Davis descendants and non-Indians, and do not provide evidence of political influence or authority within the petitioner. Although the petitioner named specific individuals as leaders between 1870 and 1950, it did not support these claims with documentation showing political processes within an Indian group. Between 1838 and 1976—138 years—the petitioner has not provided any evidence that the petitioner's ancestors maintained formal or informal political relationships that advanced issues of interest to a distinct group of Cherokee descendants. From 1976 to the present, the petitioner submitted almost no evidence showing how the petitioner organized activities, dealt with conflict and threats to Indian descendants, or represented the interests of its members other than by seeking acknowledgment and protecting GTEC's name in court. Therefore, the petitioner does not meet criterion 83.7(c).

Criterion (d) requires a copy of the group's present governing document, including its membership criteria. The petitioner provided two versions of its 2002 constitution and bylaws, which describe how the group determines its membership and how it governs itself. The GTEC petitioner provided evidence that satisfies the requirements of criterion 83.7(d).

Criterion (e) requires that the petitioner's membership consist of individuals who descend from a historical Indian tribe or from historical Indian tribes, which combined and functioned as a single autonomous political entity. The current membership list, dated August 10, 2013, which the governing body separately certified, has the required elements. The petitioner has demonstrated that about 90 percent of its members (413 of 458) descend from the historical Cherokee Nation as it existed before the 1838 Removal. Therefore, the GTEC petitioner satisfies the requirements of criterion 83.7(e).

Criterion (f) requires that the membership of the petitioner be composed principally of persons who are not members of any acknowledged North American Indian tribe. The OFA found no members of GTEC enrolled with the Eastern Band of Cherokee Indians, a federally recognized Indian tribe. The OFA found that 13 members of GTEC are enrolled with the Cherokee Nation, a federally recognized Indian tribe. The membership of the GTEC petitioner is composed principally of persons who are not members of any North American Indian tribe. Thus, the GTEC petitioner satisfies the requirements of criterion 83.7(f).

Criterion (g) requires that neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. No evidence has been found to indicate that the petitioner was subject of congressional legislation to terminate or prohibit a Federal relationship as an Indian tribe. Therefore, the petitioner meets the requirements of criterion 83.7(g).

Based on this preliminary factual determination, the Department proposes to decline to acknowledge the GTEC petitioner as an Indian tribe within the meaning of Federal law.

A report summarizing the evidence, reasoning, and analyses for the PF will be provided to the petitioner and interested parties. The PF is available to other parties upon written request as provided by 25 CFR 83.10(h) or available on the Department of the Interior's Web site at *http://www.doi.gov.* Requests for a copy of the summary evaluation of the evidence should be addressed to the Federal Government as instructed in the **ADDRESSES** section of this notice.

Publication of this notice of the PF in the **Federal Register** initiates a 180-day comment period during which the petitioner and interested and informed parties may submit arguments and evidence to support or rebut the evidence relied upon in the PF. Comments on the PF should be addressed to both the petitioner and the Federal Government as required by 25 CFR 83.10(i) and as instructed in the **ADDRESSES** section of this notice by the date listed in the **DATES** section of this notice.

The regulations, 25 CFR 83.10(k), provide the petitioner a minimum of 60 days to respond to any submissions on the PF received from interested and informed parties during the comment period. After the expiration of the comment and response periods described above, the Department will consult with the petitioner concerning establishment of a schedule for preparation of the FD. The AS–IA will publish the FD of the petitioner's status in the **Federal Register** as provided in 25 CFR 83.10(l), at a time that is consistent with that schedule.

Dated: May 6, 2016.

Lawrence S. Roberts,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2016–11301 Filed 5–12–16; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000.51010000.ER0000. LVRWK09K1000; WYW174597; COC72909; UTU87237]

Notice of Availability of the Final Environmental Impact Statement for the Energy Gateway South Transmission Project and Proposed Land-Use Plan Amendments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) and the United States Forest Service (Forest Service) announce the availability of the Final Environmental Impact Statement (EIS) for the Energy Gateway South Transmission Project (Project) and proposed land-use plan amendments (LUPAs). The Final EIS analyzes the potential environmental consequences of granting a right-of-way (ROW) to PacifiCorp (doing business as Rocky Mountain Power) to construct and operate an extra-high voltage (EHV) alternating-current (AC) transmission system.

DATES: BLM planning regulations (43 CFR 1610.5–2) state that any person who meets the conditions as described in the regulations may protest the BLM's Final EIS/Proposed LUPAs. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Final EIS and proposed LUPAs have been sent to Federal, State, and local governments; public libraries in the area potentially affected by the proposed Project; and to interested parties that previously requested a copy. The Final EIS/Proposed LUPAs and supporting documents will be available electronically on the following BLM Web site: *http://www.blm.gov/wy/st/en/info/NEPA/documents/hdd/gateway_south.html*. Copies of the Final EIS and Proposed LUPAs are available for public inspection at the locations identified in the **SUPPLEMENTARY INFORMATION** section of this notice. Protests on the BLM land-use planning process must be submitted in writing and mailed by July 12, 2016. To submit a protest via regular mail, send to BLM Director (210), Attention: Protest Coordinator, P.O. Box 71383, Washington, DC 20004–1383. Protests submitted via overnight mail should be sent to BLM Director (210), Attention: Protest Coordinator, 20 M Street SE., Room 2134LM, Washington, DC 20003. The BLM will issue its ROD after any protests are resolved but no earlier than 30 days after the Final EIS is available.

FOR FURTHER INFORMATION CONTACT: Tamara Gertsch, Project Manager, Bureau of Land Management, Wyoming State Office, P.O. Box 21150, Cheyenne, WY 82003; by telephone at (307) 775–6115; or email to *GatewaySouth_WYMail@blm.gov*. Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at (800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

For information about the Forest Service's involvement, contact Kenton Call, Forest Service Project Lead by telephone at (435) 691–0768; or email to *ckcall@fs.fed.us*. The Forest Service will provide information about its draft decisions, and details about the pre-decisional objection process associated with the Forest Service's Draft ROD in its Gateway South Project Final EIS NOA to be published in the **Federal Register** at a later date.

SUPPLEMENTARY INFORMATION: PacifiCorp (doing business as Rocky Mountain Power) filed a ROW application with the BLM to construct and operate a 500kilovolt (kV), overhead, single-circuit, alternating-current, transmission line beginning near Medicine Bow, Carbon County, Wyoming, at the Aeolus Substation, and extending south and west to the planned Clover Substation near Mona, Juab County, Utah, an approximate distance of between 400 and 540 miles (depending on the route selected). The proposed Project also would include rebuilding two existing 345kV transmission lines between the Clover and Mona Substations (in the existing right-of-way approximately 2-miles in length), rerouting the Mona to Huntington 345kV transmission line through the Clover Substation, constructing communication regeneration stations, two series compensation stations at points between Aeolus and Clover substations to improve transport capacity and efficiency of the transmission line and, depending on the route selected, relocating approximately 2 miles of the existing Bears Ears to Bonanza 345kV transmission line to parallel the proposed line, off the Raven Ridge Area of Critical Environmental Concern (ACEC), thereby eliminating multiple crossings of transmission lines within a short distance. Equipment to accommodate the 500kV transmission line would be installed at the Aeolus and Clover substations. The requested ROW width would be 250 feet for the 500kV portion of the proposed Project and 150 feet for the 345kV portion of the proposed Project. If the Project is approved, construction is projected to start in 2018.

The proposed Project is designed to provide up to 1,500 megawatts of capacity to meet current and forecasted needs of Rocky Mountain Power's customers. The transmission line would transmit power from both renewable and thermal energy sources. Alternative routes considered in the Final EIS cross Federal, State, tribal, and private lands. Under Federal law, the BLM is responsible for responding to applications for ROW on BLM-administered lands. Similarly, under Federal law, the Forest Service is responsible for responding to applications for special-use authorizations on lands administered by the Forest Service. The BLM is the designated lead Federal agency for preparing the EIS as defined at 40 Code of Federal Regulations (CFR) Part 1501.5. The Forest Service is a cooperating agency in the proposed Project based on its potential Federal action to issue a special use permit across Forest Service lands. Additional cooperating agencies include Federal, State, tribal and local agencies.

In accordance with NEPA, the BLM prepared a Draft EIS in response to the ROW application for the proposed Project using an interdisciplinary approach in order to consider a variety of resource issues and concerns identified during internal, interagency and public scoping. An NOA for the Draft EIS for the Project was published by the EPA for the Forest Service in the **Federal Register** on February 21, 2014 (79 FR 9898), initiating a 90-day public comment period. The BLM also published an NOA for the Draft EIS on the same date (79 FR 9916). To allow the public an opportunity to review information associated with the proposed Project and comment on the Draft EIS, the BLM conducted 12 open-house meetings in March and April 2014 in Grand Junction, Rangely, and Craig, Colorado; Baggs and Rawlins, Wyoming; and Vernal, Fort Duchesne, Roosevelt, Green River, Price, Mount Pleasant, and Nephi, Utah. During the comment period, the BLM received 603 submittals from Federal, State, and local agencies; public and private organizations; and individuals, of which 301 were one version of a form letter and 126 were a form postcard. Principal issues identified in the comments received by BLM included:

- Mitigation;
- Opposition to, or support for, specific route alignments; and
- Impacts on sensitive biological resources, including sage-grouse and special status plant species.

Comments received on the Draft EIS were incorporated, where appropriate, to clarify the analysis presented and are included in the Final EIS. Based on comments received on the Draft EIS, revisions were made to the alignment of the Agency Preferred Alternative, including reduced separation distance from existing transmission to reflect updated Western Electricity Coordinating Council guidance. In addition, the BLM developed a series of route variations to compare local routing options for segments of the Agency Preferred Alternative route.

The Final EIS considers 12 alternative routes totaling 1,425 miles in detail and a No Action Alternative. Also, a series of route variations to compare local routing options for segments of the Agency Preferred Alternative route were analyzed. Under the No Action Alternative, the BLM ROW and the Forest Service special-use authorization for the proposed Project to cross Federal lands would not be granted and the transmission line and ancillary facilities would not be constructed.

Approximately 51 miles (12 percent) of the Agency Preferred Alternative route is located within designated utility corridors. The Agency Preferred

Alternative route is co-located with existing transmission lines for a distance of 116 miles (28 percent) of the total length of 416 miles. The Agency Preferred Alternative route crosses 231 miles of Federal; 1.6 miles of tribal; 48 miles of State; and 135 miles of private land.

In Wyoming, the Agency Preferred Alternative route exits the Aeolus Substation in the utility corridor designated by Wyoming Executive Order 2011–5 for the protection of sage-grouse, continuing to the southwest where it crosses Interstate 80 approximately 10 miles east of Sinclair, Wyoming. The Agency Preferred Alternative route continues west on the southern side of Interstate 80 (approximately 3 to 5 miles south) for approximately 57 miles. The Agency Preferred Alternative route then parallels Wamsutter Road (on the east side of the road) south for approximately 15 miles. At that point, the Agency Preferred Alternative route continues southwest crossing Flat Top Mountain and continues toward the Wyoming and Colorado border, approximately 22 miles west of Baggs, Wyoming.

The Agency Preferred Alternative route continues south/southwest into Colorado and through the Sevenmile Ridge area, where it crosses the Little Snake River, the western edge of the Godiva Rim, and Colorado State Highway 318 in an area approximately 10 miles northwest of Maybell, Colorado. The Agency Preferred Alternative route continues south crossing the Yampa River 5 miles northeast of Cross Mountain Gorge to a point near U.S. Highway 40 approximately 12 miles southwest of Maybell. At that point, the Agency Preferred Alternative parallels U.S. Highway 40 for approximately 3 miles before continuing west to avoid crossing the Tuttle Ranch Conservation Easement and to minimize crossing of the Cross Mountain Ranch Conservation Easement. The route crosses the Deerlodge Road entrance to the Dinosaur National Monument on a State of Colorado parcel before continuing roughly south to parallel the Bonanza to Bears Ears 345kV and the Hayden to Artesia 138kV transmission lines south of U.S. Highway 40. The route terminates at a point approximately 22 miles east of Dinosaur, Colorado, and crosses 1.8 miles of the Cross Mountain Ranch Conservation Easement. From this point, the Agency Preferred Alternative route continues to parallel the Bears Ears to Bonanza 345kV and the Hayden to Artesia 138kV transmission lines to the west toward the Colorado/Utah border. The Agency Preferred Alternative route continues to follow the Bears Ears to Bonanza 345kV transmission line southwest toward the Bonanza Power Plant. The Agency Preferred Alternative route then continues west/southwest following an underground pipeline through an area where the Uinta Basin hookless cactus and clay reed-mustard occurs (Federally listed plant species) and crossing the Green River approximately 8 miles north of Sand Wash boat launch, continuing west toward the western end of the Tavaputs Plateau. In the plateau, the Agency Preferred Alternative route traverses through Argyle Ridge for approximately 12 miles dropping southwest toward U.S. Highway 191, following the highway through Indian Canyon for approximately 2 miles; it then crosses the highway heading west/northwest into the Emma Park area (approximately 11 miles north of Helper, Utah) toward Soldier Summit for a distance of approximately 21 miles avoiding sage-grouse leks/habitat to the south and the Reservation Ridge Scenic Backway (designated by the Forest Service) to the north. The Agency Preferred Alternative route continues west toward U.S. Highway 6 and parallels the Spanish Fork to Carbon 138kV transmission line northwest for approximately 25 miles. The Agency Preferred Alternative route continues paralleling the Bonanza to Mona 345kV transmission line toward Thistle, Utah, turning south and crosses U.S. Highway 89 near Birdseye, Utah, continuing south/southwest to a point approximately 5 miles north of Fountain Green, Utah. The Agency Preferred Alternative route continues to parallel the Bonanza to Mona 345kV transmission line west through Salt Creek Canyon, south of Mount Nebo, toward Nephi, Utah, and the Clover Substation.

The Agency Preferred Alternative route was identified by the BLM in coordination with the Forest Service and other cooperating agencies using criteria based key resource concerns and issues, regulation and policy, and Council of Environmental Quality regulations for determining significance. The criteria used include the following:

- Maximizes use of existing designated utility corridors by locating within the corridors or paralleling existing linear utility ROWs.
- Avoids or minimizes impacts on resources that are regulated by law, after consideration of proposed Project design features and agency best management practices. This includes impacts on greater sage-grouse.
- Avoids potential impacts and minimizes unavoidable impacts on resources that may not be regulated by law.
- Reduces the need for plan amendments through conformance to land-use plans.
- Avoids or minimizes proximity to private residences and residential areas, thereby addressing concerns with public health and safety, aesthetics, property values, visual effects, and other concerns.
- Minimizes use of private lands, assuming natural resource impacts are more or less similar.

Copies of the Final EIS are available for public review during normal business hours at the following locations:

- BLM, Wyoming State Office, Public Reading Room, 5353 Yellowstone Road, Cheyenne, Wyoming 82009;
- BLM, Rawlins Field Office, 1300 North Third Street, Rawlins, Wyoming 82301;
- BLM Colorado State Office, Public Reading Room, 2850 Youngfield Street, Lakewood, Colorado 80215–7093;
- BLM, Grand Junction Field Office, 2815 H Road, Grand Junction, Colorado 81506;
- BLM, Little Snake Field Office, 455 Emerson Street, Craig, Colorado 81625;
- BLM, White River Field Office, 220 East Market Street, Meeker, Colorado 81641;
- BLM Utah State Office, Public Reading Room, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345;
- BLM, Fillmore Field Office, 35 East 500 North, Fillmore, Utah 84631;
- BLM, Moab Field Office, 82 East Dogwood, Moab, Utah 84532;
- BLM, Price Field Office, 125 South 600 West, Price, Utah 84501;
- BLM, Salt Lake Field Office, 2370 South Decker Lake Boulevard, West Valley City, Utah 84119;
- BLM, Richfield Field Office, 150 East 900 North, Richfield, Utah 84701;
- BLM, Vernal Field Office,170 South 500 East, Vernal, Utah 84078; and
- Forest Service (Lead Forest Office), Ashley National Forest Supervisor's Office, 355 North Vernal Avenue, Vernal, Utah 84078.

Agency Decisions on the Proposed Project: Based on the environmental analysis in the Final EIS, the BLM Wyoming State Director will render a decision for the portion of the project which affect public land. The Forest Service will issue a separate decision specific to National Forest System land.

As the lead agency, the BLM has coordinated and utilized the NEPA comment process to satisfy the public involvement for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), as provided for in 36 CFR 800.2(d)(3). Ongoing consultation with American Indian tribes will continue in accordance with policy. Tribal concerns, including impacts on Indian trust assets, will be given due consideration. Federal, State, and local agencies, as well as other stakeholders interested or affected by the decisions on this proposed Project, are invited to respond to this notice.

BLM Land-use Plan Amendments and the Protest Process: Depending on the route alternative, potential LUPAs proposed by the BLM are needed for the portions of the proposed Project crossing public land that do not conform to the respective land use plan. These include the following:

- Converting utility corridors from underground use only to allow aboveground utilities;
- Modifying BLM visual resource management classifications; and
- Widening portions of a utility corridor designated in a land-use plan to include the Project ROW.

The BLM is proposing seven LUPAs where the Agency Preferred Alternative route is not in conformance with the existing land-use plans.

All proposed LUPAs would comply with applicable Federal laws and regulations and can apply only to Federal lands and mineral estate administered by the BLM.

- Rawlins Resource Management Plan (RMP): One amendment for visual resource management
- Little Snake RMP: One amendment for visual resource management
- Pony Express RMP (Salt Lake Field Office): One amendment to establish a new utility corridor
- Price RMP: One amendment to *widen a portion of an existing utility corridor*
- Vernal RMP: Three amendments for visual resource management

Instructions for filing a protest with the BLM Director regarding the proposed land-use plan amendments may be found in the "Dear Reader" letter of the Final EIS and at 43 CFR 1610.5–2. All protests must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above. Emailed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular mail or overnight delivery postmarked by the close of the protest period. Under these conditions, the BLM will consider the email as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct emails to *protest@blm.gov.*

Before including your phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including personal identifying information—may be made publicly available at any time. While you may ask the BLM in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2.

Larry Claypool,

Acting Wyoming State Director.

[FR Doc. 2016–11371 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVW0000.L5110000.GN0000. LVEMF1402860.14X; MO# 4500089716]

Notice of Availability of the Final Environmental Impact Statement for the Proposed Coeur Rochester Mine Plan of Operations Amendment 10 and Closure Plan, Pershing County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Final Environmental Impact Statement (EIS) for the Coeur Rochester Mine Plan of Operations Amendment 10 and Closure Plan and by this notice is announcing its availability.

DATES: The BLM will not issue a final decision on the proposal for a minimum of 30 days after the date that the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the Coeur Rochester Mine Plan of Operations Amendment 10 and Closure Plan EIS are available for public inspection at the Winnemucca District BLM, 5100 E. Winnemucca Blvd., Winnemucca, NV. Interested persons may also review the Final EIS on the Internet at *http://on.doi.gov/1d5pIxR.*

FOR FURTHER INFORMATION CONTACT: Kathleen Rehberg, Project Lead, telephone 775–623–1500; address BLM Winnemucca District, Humboldt River Field Office, 5100 E. Winnemucca Blvd., Winnemucca, NV 89445; email *krehberg@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The applicant, Coeur Rochester, Inc. (CRI), has requested an expansion of its operations at the existing Coeur Rochester Mine, which is located approximately 18 miles northeast of Lovelock, Nevada, in the Humboldt Range, Pershing County. The mine is currently authorized to disturb up to 1,939 acres (approximately 187 acres of private land and 1,752 acres of public land), which was permitted under a series of Environmental Assessments (EA N26–86–002P, February 1986; EA NV–020–99–12, February 1999; EA NV–020–01–06, December 2000; EA NV–020–01–06, February 2002; EA NV–020–03–13, August 2003; DOI–BLM–NV–W010–2010–0010–EA, October 2010).

The Draft EIS analyzed the potential environmental impacts associated with the proposed changes to CRI's current operations presented under this Plan of Operations (Plan) modification, which includes a total of 254.5 acres of new disturbance proposed on public land, and a reduction of approved disturbance acres of 23.3 acres on private land.

The Draft EIS analyzed three alternatives: (1) The Proposed Action; (2) Permanent Management of Potentially Acid Generating (PAG) Material Outside of the Rochester Pit Alternative; and (3) The No Action Alternative. The Proposed Action would include a change to the Plan boundary designed to include existing claims and newly acquired private lands within the boundary. However, all of the proposed disturbance to public land would be within the existing approved Plan boundary. The project includes the following:

- An approximately 67-acre expansion to the existing Stage IV Heap Leach Pad (HLP);
- An increase of the allowable maximum Stage IV HLP stacking height from 330 feet to 400 feet;
- Construction of a 124-acre Stage V HLP with associated ponds and tank;
- Relocation of a portion of the American Canyon public access road and establishment of an associated right-of-way (ROW);
- Relocation of a portion of the paved Rochester main access road ROW;

- Realignment of the Stage IV haul road and construction of secondary access roads;
- Relocation of existing power lines consistent with the proposed ROW realignments and HLP construction;
- Relocation of the electrical building, core shed, and production well PW–2a;
- Excavation of new borrow areas and construction of one new growth medium stockpile;
- Installation of the Stage IV HLP conveyor system, associated load out points, ore stockpiles, maintenance road, and utility corridor, including process solutions and fresh water supply pipelines; and
- Changes to closure activities for existing facilities including: altering the open pit safety berm sizes; HLP interim fluid management plans; HLP cover designs; the installation of evaporation cells; and long-term draindown management.

Under the Permanent Management of PAG Material Outside of the Rochester Pit Alternative, which is the BLM preferred alternative, the proposed activities listed in the Proposed Action would be the same, with the exception of the permanent location of the PAG material. In this alternative the material would be permanently relocated outside of the existing pit.

Under the No-Action Alternative, the BLM would not approve the proposed Plan modification and there would be no expansion. CRI would continue mining activities under its previously approved plan of operation.

Three other alternatives were considered, but eliminated: (1) Pit Backfill Elevation Alternative; (2) Alternate Location for Stage V HLP Alternative; and (3) Close a Portion of American Canyon Road to Public Access Alternative.

A Notice of Availability of the Draft EIS for the Proposed Coeur Rochester Mine Plan of Operations Amendment 10 and Closure Plan was published in the **Federal Register** on August 21, 2015 (80 FR 50864). Two open house public meetings were held during the comment period. One hundred and forty two (142) comment letters were received during a 45-day period; however, 135 of those did not contain any substantive comments. The majority of the comments was in support of the project and centered on the local and economic benefits. There were seven comment letters that contained substantive comments, which included concerns about impacts to special status species, especially Preble's shrew, post-closure monitoring and mitigation activities, impacts to water and air, climate change, and recommendations on the preferred alternative and cultural mitigation. These comments were considered and addressed in Appendix A (Response to Comments on the Draft Environmental Impact Statement) of the Final EIS.

On September 21, 2015, during the public scoping of this Draft EIS, the *Record of Decision (ROD) and Approved Resource Management Plan Amendments for the Great Basin Region, including the Greater Sage-Grouse Sub-Regions of Idaho and Southwestern Montana, Nevada and Northeastern California, Oregon, and Utah* (Greater Sage-Grouse Plan Amendment) was signed. For consistency with the Greater Sage-Grouse Plan Amendment, the BLM compared the maps and habitat categories in that document to the initial habitat maps from BLM Instruction Memorandum (IM) 2012–044 (December 27, 2011) that were used in the development of the Draft EIS for the Proposed Coeur Rochester Mine Plan of Operations Amendment 10 and Closure Plan. According to the new map, approximately 20 acres of proposed disturbance from the Coeur Rochester project would be in General Habitat (versus 168 acres of Preliminary General Habitat analyzed in this Draft EIS) with the remainder now in an Other Habitat category. In other words, the new map in the Greater Sage-Grouse Plan Amendment shows less General Habitat within the proposed disturbance area than was analyzed in this Draft EIS under previous guidelines. The analysis and resulting mitigation for Greater Sage-Grouse outlined in Chapter 6 (Mitigation and Monitoring) of this Final EIS are thus consistent with the guidelines outlined in the Greater Sage-Grouse Plan Amendment, Appendix F (Regional Mitigation Strategy) and Appendix I (Avoid, Minimize, and Apply Compensatory Mitigation Flowchart.) The preferred alternative includes over 330 acres of mitigation in Sagebrush Focal Areas and prime habitat located in National Conservation Areas and wilderness areas, which would result in a net conservation gain to Sage-grouse, as well as benefit other species.

Comments on the Draft EIS received from the public and internal BLM review were considered and incorporated as appropriate into the Final EIS. Public comments resulted in the addition of clarifying text, but did not significantly change the analysis. Following a 30-day availability and review period, a Record of Decision (ROD) will be issued. The decision reached in the ROD is subject to appeal to the Interior Board of Land Appeals. The 30-day appeal period begins with the issuance of the ROD.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Steve Sappington,

Field Manager, Humboldt River Field Office.

[FR Doc. 2016–11287 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SERO–RTCA–20896; PPMPSPD1T.Y00000] [PPSESERO10]

Cancellation of June 1, 2016, Meeting of the Wekiva River System Advisory Management Committee

AGENCY: National Park Service, Interior.

ACTION: Cancellation of meeting.

SUMMARY: Notice is hereby given in accordance with the Federal Advisory Committee Act, (5 U.S.C. Appendix 1–16), that the June 1, 2016, meeting of the Wekiva River System Advisory Management Committee previously announced in the **Federal Register**, Vol. 81, February 2, 2016, pp. 5481, is cancelled.

FOR FURTHER INFORMATION CONTACT: Jaime Doubek-Racine, Community Planner and Designated Federal Official, Rivers, Trails, and Conservation Assistance Program, Florida Field Office, Southeast Region, 5342 Clark Road, PMB #123, Sarasota, Florida 34233, or via telephone (941) 685–5912.

SUPPLEMENTARY INFORMATION: The Wekiva River System Advisory Management Committee was established by Public Law 106–299 to assist in the development of the comprehensive management plan for the Wekiva River System and provide advice to the Secretary of the Interior in carrying out management responsibilities of the Secretary under the Wild and Scenic Rivers Act (16 U.S.C. 1274).

Dated: May 3, 2016.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–11377 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–EE–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–PAGR–20767; PX.PR166532I.00.1]

Request for Nominations for the Paterson Great Falls National Historical Park Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior, proposes to appoint new members to the Paterson Great Falls National Historical Park Advisory Commission (Commission). The NPS is requesting nominations for qualified persons to serve as members of the Commission.

ADDRESSES: Darren Boch, Superintendent and Designated Federal Officer, Paterson Great Falls National Historical Park, 72 McBride Avenue, Paterson, New Jersey 07501, (973) 523–2630 or email *darren_boch@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Darren Boch, Superintendent and Designated Federal Officer, Paterson Great Falls National Historical Park, 72 McBride Avenue, Paterson, New Jersey 07501, (973) 523–2630 or email *darren_boch@nps.gov.*

SUPPLEMENTARY INFORMATION: The Paterson Great Falls National Historical Park Advisory Commission was established by 16 U.S.C. 410*lll*(e). The purpose of the Commission is to advise the Secretary of the Interior in the development and implementation of the management plan.

The Commission is composed of 9 members, to be appointed by the Secretary of the Interior, of whom: (i) 4 members shall be appointed after consideration of recommendations submitted by the Governor of the State of New Jersey; (ii) 4 members shall be appointed after consideration of recommendations submitted by the City Council of Paterson, New Jersey; (iii) 1 member shall be appointed after consideration of recommendations submitted by the Board of Chosen Freeholders of Passaic County, New Jersey, and (iv) 2 members shall have experience with national parks and historic preservation.

We are currently requesting nominations for the last of these categories.

Members may be appointed for a term of 3 years. A member may be reappointed for not more than 1 additional term.

Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Commission and permit the Department of the Interior to contact a potential member.

Members of the Commission serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Commission as approved by the Designated Federal Officer, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under 5 U.S.C. 5703.

Individuals who are Federally registered lobbyists are ineligible to serve on all Federal Advisory Committee Act (FACA) and non-FACA boards, committees, or councils in an individual capacity. The term "individual capacity" refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

All nominations must be compiled and submitted in one complete package. Incomplete submissions (missing one or more of the items described above) will not be considered.

Dated: April 29, 2016.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–11375 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–EE–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–CACO–20695; PPNECACOS0, PPMPSD1Z.YM0000]

Request for Nominations for the Cape Cod National Seashore Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior, proposes to appoint new members to the Cape Cod National Seashore Advisory Commission (Commission). The NPS is requesting nominations for qualified persons to serve as members of the Commission.

DATES: Written nominations must be received by June 13, 2016.

ADDRESSES: Nominations or request for further information should be sent to George E. Price, Jr., Superintendent, Cape Cod National Seashore, 99 Marconi Site, Wellfleet, Massachusetts 02667, or via telephone at (508) 771–2144.

FOR FURTHER INFORMATION CONTACT: Further information may be obtained from George E. Price, Jr., Superintendent, Cape Cod National Seashore, 99 Marconi Site, Wellfleet, Massachusetts 02667, or via telephone at (508) 771–2144.

SUPPLEMENTARY INFORMATION: The Cape Cod National Seashore was established June 1, 1966, in accordance with 16 U.S.C. 459b–2 *et seq.* Section 459b–7 established the Commission to consult with the Secretary of the Interior, or the Secretary's designee, with respect to matters relating to the development of the Cape Cod National Seashore, and with respect to carrying out the provisions of Sections 4 and 5 of the Act establishing the Seashore.

The Commission is composed of 10 members appointed by the Secretary of the Interior for 2-year terms, as follows: (a) Six members from recommendations made by the boards of selectmen of the towns of Chatham, Eastham, Orleans, Provincetown, Truro and Wellfleet, in the Commonwealth of Massachusetts, one member from the recommendations made by each such board; (b) one member from recommendations of the county commissioners of Barnstable County, Commonwealth of Massachusetts; (c) two members from recommendations of the Governor of the Commonwealth of Massachusetts; and (d) one member appointed at the discretion of the Secretary.

We are currently requesting nominations for the last of these categories.

Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Commission and permit the Department of the Interior to contact a potential member.

Members of the Commission serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Commission as approved by the Designated Federal Officer, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under 5 U.S.C. 5703.

Individuals who are Federally registered lobbyists are ineligible to serve on all Federal Advisory Committee Act (FACA) and non-FACA boards, committees, or councils in an individual capacity. The term "individual capacity" refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

All nominations must be compiled and submitted in one complete package. Incomplete submissions (missing one or more of the items described above) will not be considered.

Dated: April 29, 2016.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–11372 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–EE–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–GATE–20475; PPNEGATEB0, PPMVSCS1Z.Y00000]

Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee

AGENCY: National Park Service, Interior.

ACTION: Notice of renewal.

SUMMARY: The Secretary of the Interior is giving notice of renewal of the Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee. The Committee provides advice on the development of a specific reuse plan and on matters relating to the future uses of the Fort Hancock Historic Landmark District within the Sandy Hook Unit of Gateway National Recreation Area.

FOR FURTHER INFORMATION CONTACT: John H. Warren, Acting Public Affairs Specialist, National Parks of New York Harbor, External Affairs Office, Sandy Hook Unit, Gateway National Recreation Area, (917) 829–0425.

SUPPLEMENTARY INFORMATION: In accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. Appendix 1–16) and with the concurrence of the General Services Administration, the Department of the Interior is announcing the renewal of an advisory committee for the Gateway National Recreation Area Fort Hancock Historic Landmark District. The Committee is a discretionary advisory committee established under the authority of the Secretary of the Interior.

The Committee has been established to provide guidance to the National Park Service in developing a plan for reuse of more than 30 historic buildings that the NPS has determined are excess to its needs and eligible for lease under 54 U.S.C. 100101(a) *et seq.*, particularly 54 U.S.C. 102102, and 54 U.S.C. 306121–306122, or under agreement through appropriate authorities.

The Committee will include representatives from, but not limited to, the following interest groups: The natural resource community, the business community, the cultural resource community, the real estate community, the recreation community, the education community, the scientific community, and hospitality organizations. The Committee will also consist of representatives from the following municipalities: The Borough of Highlands, the Borough of Sea Bright, the Borough of Rumson, Middletown Township, and Monmouth County Freeholders.

Certification Statement: I hereby certify that the renewal of the Gateway National Recreation Area Fort Hancock 21st Century Advisory Committee is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by the National Park Service Organic Act (54 U.S.C. 100101(a) *et seq.*), and other statutes relating to the administration of the National Park Service.

Dated: April 26, 2016.

Sally Jewell,

Secretary of the Interior.

[FR Doc. 2016–11383 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–EE–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–CEBE–20608; PPNECEBE00, PPMPSPD1Z.Y00000]

Request for Nominations for the Cedar Creek and Belle Grove National Historical Park Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior, proposes to appoint new members to the Cedar Creek and Belle Grove National Historical Park Advisory Commission (Commission). The NPS is requesting nominations for qualified persons to serve as members of the Commission.

DATES: Written nominations must be received by June 13, 2016.

ADDRESSES: Nominations or requests for further information should be sent to Karen Beck-Herzog, Acting Site Manager, Cedar Creek and Belle Grove National Historical Park, 8693 Valley Pike, P.O. Box 700, Middletown, Virginia 22645, telephone (540) 868–9176.

FOR FURTHER INFORMATION CONTACT: Karen Beck-Herzog, Acting Site Manager, Cedar Creek and Belle Grove National Historical Park, 8693 Valley Pike, P.O. Box 700, Middletown, Virginia 22645, telephone (540) 868–9176, email *karen_beck-herzog@nps.gov.*

SUPPLEMENTARY INFORMATION: The Cedar Creek and Belle Grove National Historical Park Advisory Commission was established in accordance with the Cedar Creek and Belle Grove National Historical Park Act of 2002 (16 U.S.C. 410iii–7). The Commission was designated by Congress to provide advice to the Secretary of the Interior on the preparation and implementation of the park's general management plan and to advise on land protection.

The Commission consists of 15 members appointed by the Secretary, as follows: (a) 1 representative from the Commonwealth of Virginia; (b) 1 representative each from the local governments of Strasburg, Middletown, Frederick County, Shenandoah County, and Warren County; (c) 2 representatives of private landowners within the Park; (d) 1 representative from a citizen interest group; (e) 1 representative from the Cedar Creek Battlefield Foundation; (f) 1 representative from the Belle Grove, Incorporated; (g) 1 representative from the National Trust for Historic Preservation; (h) 1 representative from the Shenandoah Valley Battlefields Foundation; (i) 1 ex-officio representative from the National Park Service; and (j) 1 ex-officio representative from the United States Forest Service.

Each member shall be appointed for a term of three years and may be reappointed for not more than two successive terms. A member may serve after the expiration of that member's term until a successor has taken office. The Chairperson of the Commission shall be elected by the members to serve a term of one year renewable for one additional year.

We are currently seeking members to represent the Commonwealth of

Virginia, the Town of Strasburg, Shenandoah County, and private landowners within the Park.

Nominations should be typed and should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Commission and permit the Department of the Interior to contact a potential member.

Members of the Commission serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Commission as approved by the Designated Federal Officer, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under Section 5703 of Title 5 of the United States Code.

Individuals who are Federally registered lobbyists are ineligible to serve on all Federal Advisory Committee Act (FACA) and non-FACA boards, committees, or councils in an individual capacity. The term "individual capacity" refers to individuals who are appointed to exercise their own individual best judgment on behalf of the government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

All nominations must be compiled and submitted in one complete package. Incomplete submissions (missing one or more of the items described above) will not be considered.

Dated: April 29, 2016.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–11368 Filed 5–12–16; 8:45 am]

BILLING CODE 4310–EE–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–16–017]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: May 20, 2016 at 1:00 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–559–561 and 731–TA–1317–1328 (Preliminary) (Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey). The Commission is currently scheduled to complete and file its determinations on May 23, 2016; views of the Commission are currently scheduled to be completed and filed on May 31, 2016.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: May 10, 2016.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2016–11447 Filed 5–11–16; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

[OMB Number 1125–0001]

Agency Information Collection Activities; Proposed Collection; Comments Requested; Application for Cancellation of Removal (42A) for Certain Permanent Residents; and Application for Cancellation of Removal and Adjustment of Status (42B) for Certain Nonpermanent Residents

AGENCY: Executive Office for Immigration Review, Department of Justice

ACTION: 30-Day notice.

The Department of Justice (DOJ), Executive Office for Immigration Review, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 12127, on March 8, 2016, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional days until June 13, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jean King, General Counsel, Executive Office for Immigration Review, U.S. Department of Justice, Suite 2600, 5107 Leesburg Pike, Falls Church, Virginia 22041; telephone: (703) 305–0470. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Executive Office for Immigration Review, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension without change of a currently approved collection.

2. *The Title of the Form/Collection:* Application for Cancellation of Removal for Certain Permanent Residents; and Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form numbers are EOIR–42A and

EOIR–42B, Executive Office for Immigration Review, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individual aliens determined to be removable from the United States. This information collection is necessary to determine the statutory eligibility of individual aliens who have been determined to be removable from the United States for cancellation of their removal, as well as to provide information relevant to a favorable exercise of discretion.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 25,654 respondents will complete the form annually with an average of 5 hours, 50 minutes per response.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 148,793 total annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: May 10, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–11321 Filed 5–12–16; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1123–0010]

Criminal Division; Agency Information Collection Activities; Proposed eCollection; eComments Requested; Request for Registration Under the Gambling Devices Act of 1962

AGENCY: Criminal Division, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: Department of Justice (DOJ), Criminal Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 13823, on March 15, 2016, allowing for a 60 day comment period.

DATES: Comments are encourages and will be accepted for an additional 30 day until June 13, 2016.

FOR FURTHER INFORMATION CONTACT: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to U.S. Department of Justice, Criminal Division, Office of Enforcement Operations, JCK Building, Room 1210, Washington, DC 20530–0001. Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- —Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- —Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- —Enhance the quality, utility, and clarity of the information to be collected; and
- —Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Registration Under the Gambling Devices Act of 1962.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Agency form number: DOJ\CRM\OEO\GDR–1. Sponsoring component: Department of Justice, Criminal Division.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Not-for-profit institutions, individuals or households, and State, Local or Tribal Government. The form can be used by any entity required to register under the Gambling Devices Act of 1962 (15 U.S.C. 1171–1178).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 7,800 respondents will complete each form within approximately 5 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 650 total annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Suite 3E.405B, Washington, DC 20530.

Dated: May 10, 2016.

Jerri Murray,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. 2016–11320 Filed 5–12–16; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0030]

Office of Attorney Recruitment and Management; Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of and Renewal of Previously Approved Collection; Comments Requested; Electronic Applications for the Attorney General's Honors Program and the Summer Law Intern Program

AGENCY: Office of Attorney Recruitment and Management, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Justice Management Division, Office of Attorney Recruitment and Management (OARM), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 12126, on March 8, 2016, allowing for a 60 day comment period. No comments were received.

DATES: Comments are encouraged and will be accepted for an additional 30 days until June 13, 2016.

FOR FURTHER INFORMATION CONTACT: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the U.S. Department of Justice, Office of Attorney Recruitment and Management, 450 5th Street NW., Suite 10200, Attn: Deana Willis, Washington, DC 20530. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20530 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and/or
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection:

(1) *Type of information collection:* Minor Revision and Renewal of a Currently Approved Collection.

(2) *The title of the form/collection:* Electronic Applications for the Attorney General's Honors Program and the Summer Law Intern Program.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: None. Office of Attorney Recruitment and Management, Justice Management Division, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None. The application form is submitted voluntarily, once a year, by law students and recent law school graduates (*e.g.,* judicial law clerks) who will be in this applicant pool only once.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 4000 respondents will complete the application in approximately 1 hour per application plus an additional 45 minutes to review instructions, search existing data sources, gather and maintain the data needed, and review the information collected, plus an estimated 600 respondents (candidates selected for interviews) who will complete a travel survey used to schedule interviews and prepare official Travel Authorizations prior to the interviewees' performing pre-employment interview travel (as defined by 41 CFR Sec. 301–1.3), as needed, in approximately 10 minutes per form, plus an estimated 400 respondents who will complete a Reimbursement Form (if applicable) in order for the Department to prepare the Travel Vouchers required to reimbursed candidates for authorized costs they incurred during pre-employment interview travel at approximately 10 minutes per form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated revised total annual public burden associated with this application is 7600 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: May 10, 2016.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2016–11322 Filed 5–12–16; 8:45 am]

BILLING CODE 4410–PB–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Public Meeting of the Advisory Committee on Apprenticeship (ACA)

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice of a public meeting.

SUMMARY: Pursuant to Section 10 of the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 § 10), notice is hereby given to announce an open meeting of the Advisory Committee on Apprenticeship (ACA) on Wednesday, June 15, 2016 and Thursday, June 16, 2016. The ACA is a discretionary committee established by the Secretary of Labor, in accordance with FACA, as amended in 5 U.S.C. App. 2, and its implementing regulations (41 CFR 101–6 and 102–3). All meetings of the ACA are open to the public.

DATES: The meeting will begin at approximately 1:00 p.m. Eastern Standard Time on Wednesday, June 15, 2016, at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210, and will continue until approximately 4:30 p.m. The meeting will reconvene on Thursday, June 16, 2016, at approximately 8:30 a.m. Eastern Standard Time at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210 and adjourn at approximately 4:30 p.m. Any updates to the agenda and meeting logistics will be posted on the Office of Apprenticeship's homepage: *http://www.dol.gov/apprenticeship.*

FOR FURTHER INFORMATION CONTACT: The Designated Federal Official, Mr. John V. Ladd, Administrator, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–5321, Washington, DC 20210, Telephone: (202) 693–2796 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In order to promote openness, and increase public participation, webinar and audio conference technology will be used throughout the meeting. Webinar and audio instructions will be posted prominently on the Office of Apprenticeship homepage: *http://www.dol.gov/apprenticeship.* Members of the public can attend the meeting in-person or virtually. Members of the public that will attend the meeting in-person are encouraged to arrive early to allow for security clearance into the Frances Perkins Building.

Security and Transportation Instructions for the Frances Perkins Building

Meeting participants should use the visitor's entrance to access the Frances Perkins Building, one block north of Constitution Avenue on 3rd and C Streets NW. For security purposes meeting participants must:

1. Present valid photo identification (ID) to receive a visitor badge.
2. Know the name of the event you are attending: The meeting event is the Advisory Committee on Apprenticeship meeting.
3. Visitor badges are issued by the security officer at the Visitor Entrance located at 3rd and C Streets NW., as described above.
4. Laptops and other electronic devices may be inspected and logged for identification purposes.
5. Due to limited parking options, Metro rail is the easiest way to travel to the Frances Perkins Building. For individuals wishing to take Metro rail, the closest Metro stop to the building is Judiciary Square on the Red Line.

Notice of Intent To Attend the Meeting

All meeting participants are being asked to submit a notice of intent to attend by Monday, June 6, 2016, via email to Mr. John V. Ladd at: *oa.administrator@dol.gov,* with the subject line "June 2016 ACA Meeting."

1. If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby on (202) 693–3795 or via email at *huckaby.kenya@dol.gov* no later than Monday, June 6, 2016.
2. Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd via email at *oa.administrator@dol.gov,* subject line "June 2016 ACA Meeting," or to the Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, Room C–5321, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions will be included in the record for the meeting if received by Monday, June 6, 2016.
3. See below regarding members of the public wishing to speak at the ACA meeting.

Purpose of the Meeting and Topics To Be Discussed

The purpose of the meeting is to focus on apprenticeship expansion and diversity, and current industry engagement efforts in order to seek advice from the ACA on industry specific issues and how best to increase Registered Apprenticeships across the country and beyond.

The agenda will cover the following topics:

- Expanding Registered Apprenticeship Opportunities for Women and Youth
- Strengthening Registered Apprenticeship Alignment with CTE and High Schools
- Ongoing Industry Engagement
- ApprenticeshipUSA and LEADERS
- State Apprenticeship Agency (SAA) Presentation
- Other Matters of Interest to the Apprenticeship Community
- Public Comment
- Adjourn

The agenda and meeting logistics may be updated should priority items come before the ACA between the time of this publication and the scheduled date of the ACA meeting. All meeting updates will be posted to the Office of Apprenticeship's homepage: *http://www.dol.gov/apprenticeship.* Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. John V. Ladd, by Monday, June 6, 2016. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Portia Wu,

Assistant Secretary for the Employment and Training Administration.

[FR Doc. 2016–11315 Filed 5–12–16; 8:45 am]

BILLING CODE 4510–FR–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting

DATE AND TIME: The Legal Services Corporation's Board of Directors will meet telephonically on May 24, 2016. The meeting will commence at 5:00 p.m., EDT, and will continue until the conclusion of the Committee's agenda.

LOCATION: John N. Erlenborn Conference Room, Legal Services Corporation Headquarters, 3333 K Street NW., Washington, DC 20007.

PUBLIC OBSERVATION: Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1–866–451–4981;
- When prompted, enter the following numeric pass code: 5907707348.
- When connected to the call, please immediately "MUTE" your telephone.

Members of the public are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold if doing so will trigger recorded music or other sound. From time to time, the Chair may solicit comments from the public.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of agenda
2. Consider and act on the Board of Directors' transmittal to accompany the Inspector General's Semiannual Report to Congress for the period of October 1, 2015 through March 30, 2016
3. Public comment
4. Consider and act on other business
5. Consider and act on adjournment of meeting.

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

ACCESSIBILITY: LSC complies with the Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals needing other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov,* at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: May 11, 2016.

Katherine Ward,

Executive Assistant to the Vice President for Legal Affairs and General Counsel.

[FR Doc. 2016–11477 Filed 5–11–16; 4:15 pm]

BILLING CODE 7050–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Submission for OMB Review; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The National Credit Union Administration (NCUA) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before June 13, 2016 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) NCUA PRA Clearance Officer, 1775 Duke Street, Alexandria, VA 22314–3428 or email at *PRAComments@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by emailing *PRAComments@ncua.gov* or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0129.

Type of Review: Reinstatement with change of a previously approved collection.

Title: Corporate Credit Unions, 12 CFR part 704.

Abstract: Part 704 of NCUA's regulations established the regulatory framework for corporate credit unions. This includes various reporting and recordkeeping requirements as well as safety and soundness standards. NCUA has established and regulates corporate credit unions pursuant to its authority under sections 120, 201, and 209 of the Federal Credit Union Act, 12 U.S.C. 1766(a), 1781, and 1789. The collection of information is necessary to ensure that corporate credit unions operate in a safe and sound manner by limiting risk to their natural person credit union members and the National Credit Union Share Insurance Fund.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Annual Burden Hours: 483.

By Gerard Poliquin, Secretary of the Board, the National Credit Union Administration, on May 10, 2016.

Dated: May 10, 2016.

Dawn D. Wolfgang,

NCUA PRA Clearance Officer.

[FR Doc. 2016–11343 Filed 5–12–16; 8:45 am]

BILLING CODE 7535–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 63–001–HLW; NRC–2015–0051]

Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste; Department of Energy; Yucca Mountain, Nye County, Nevada

AGENCY: Nuclear Regulatory Commission.

ACTION: Supplement to environmental impact statement; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued the final "Supplement to the U.S. Department of Energy's Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," NUREG–2184. This supplements the U.S. Department of Energy's (DOE) 2002 Environmental Impact Statement (EIS) and its 2008 Supplemental EIS for the proposed repository at Yucca Mountain in accordance with the findings and scope outlined in the NRC staff's 2008 Adoption Determination Report (ADR) for DOE's EISs. The scope of this supplement is limited to the potential environmental impacts from the proposed repository on groundwater and from surface discharges of groundwater.

DATES: May 13, 2016.

ADDRESSES: Please refer to Docket ID NRC–2015–0051 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0051. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, the ADAMS accession numbers are provided in a table in the "Availability of Documents" section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Christine Pineda, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–6789.

SUPPLEMENTARY INFORMATION:

I. Discussion

This supplement evaluates the potential environmental impacts on groundwater and impacts associated with the discharge of any contaminated groundwater to the ground surface due to potential releases from a geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nye County, Nevada. This supplements DOE's 2002 "Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" and its 2008 "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," in accordance with the findings and scope outlined in the NRC staff's 2008 "Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain." The ADR provided the NRC staff's conclusion as to whether it is practicable for the NRC to adopt DOE's EISs under the Nuclear Waste Policy Act of 1982, as amended. The NRC's decision on adoption of the EISs will occur after completion of the adjudication under part 2, subpart J of title 10 of the *Code of Federal Regulations.*

The scope of this supplement is limited to those areas identified for supplementation in the ADR, specifically, the potential environmental impacts from the proposed repository on groundwater and from surface discharges of groundwater. In the ADR, the NRC staff found that the analysis in DOE's EISs does not provide adequate discussion of the radiological and nonradiological contaminants that may enter the groundwater over time and how these contaminants would behave in the aquifer and surrounding environments. This supplement provides the information the NRC staff identified in its ADR as necessary. The supplement describes the affected environment with respect to the groundwater flow path for potential contaminant releases from the repository that could be transported beyond the postclosure regulatory compliance location through the alluvial aquifer in Fortymile Wash and the Amargosa Desert, and to the Furnace Creek and Middle Basin areas of Death Valley. The analysis in this supplement considers both radiological and nonradiological contaminants.

Using groundwater modeling, the NRC staff finds that contaminants from the repository would be captured by groundwater withdrawal along the flow path, such as the current pumping in the Amargosa Farms area, or would continue to Death Valley if there is no or reduced pumping. Therefore, this supplement provides a description of the flow path from the postclosure regulatory compliance location to Death Valley, the locations of current groundwater withdrawal, and locations of potential natural discharge along the groundwater flow path. The supplement evaluates the potential radiological and nonradiological environmental impacts to groundwater and at surface discharge locations over a 1-million-year period following repository closure. The analysis considers the potential impacts on the aquifer environment, soils, ecology, public health, and the potential for disproportionate impacts on minority and low-income populations. In addition, this supplement assesses the potential for cumulative impacts that may be associated with other past, present, or reasonably foreseeable future actions. The NRC staff finds that all of the impacts on the resources evaluated in this supplement would be SMALL.

The draft supplement notice of availability and public meetings was published in the **Federal Register** on August 21, 2015 (80 FR 50875). A notice of extension to the public comment period was published on September 18, 2015 (80 FR 56501).

II. Availability of Documents

The documents identified in the following table are available to interested persons through ADAMS.

Document	ADAMS Accession No.
NRC Staff's "Supplement to the U.S. Department of Energy's Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," NUREG–2184.	ML16125A032
NRC Staff's Adoption Determination Report	ML082420342
NRC **Federal Register** notice of intent to prepare a supplement to a final supplemental environmental impact statement	ML15058A595
NRC **Federal Register** notice of availability of the draft supplement for public comment	ML15223B192
NRC **Federal Register** notice of extension of the public comment period for the draft supplement	ML15254A399
DOE "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada".	ML081750191
DOE "Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada".	ML032690321

Dated at Rockville, Maryland, this 4th day of May 2016.

For the Nuclear Regulatory Commission.

James Rubenstone,

Acting Director, Yucca Mountain Directorate, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2016–11075 Filed 5–12–16; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Hispanic Council on Federal Employment

AGENCY: U.S. Office of Personnel Management.

ACTION: Council meeting.

SUMMARY: The Hispanic Council on Federal Employment (Council) meeting will be held on Wednesday, June 29th at the location shown below from 10:00 a.m. to 11:30 a.m.

The Council is an advisory committee composed of representatives from Hispanic organizations and senior government officials. Along with its other responsibilities, the Council shall advise the Director of the Office of Personnel Management on matters involving the recruitment, hiring, and advancement of Hispanics in the Federal workforce. The Council is co-chaired by the Director of the Office of Personnel Management and the Chair of the National Hispanic Leadership Agenda (NHLA).

The meeting is open to the public. Please contact the Office of Personnel Management at the address shown below if you wish to present material to the Council at any of the meetings. The manner and time prescribed for presentations may be limited, depending upon the number of parties that express interest in presenting information.

ADDRESSES: U.S. Office of Personnel Management, 1900 E St. NW., Executive Conference Room, 5th Floor, Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Sharon Wong, Acting Director, Office of Diversity and Inclusion, Office of Personnel Management, 1900 E St. NW., Suite 5H35, Washington, DC 20415. Phone (202) 606–0020 FAX (202) 606–6012 or email at *sharon.wong@opm.gov.*

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

[FR Doc. 2016–11288 Filed 5–12–16; 8:45 am]

BILLING CODE 6820–B2–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Li-ion Motors Corp. (a/k/a Terra Inventions Corp.), PetroHunter Energy Corp., and Shrink Nanotechnologies, Inc.; Order of Suspension of Trading

May 11, 2016.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Li-ion Motors Corp. (a/k/a Terra Inventions Corp.) (CIK No. 1141263), a dissolved Nevada corporation with its principal place of business listed as Las Vegas, Nevada with stock quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link") under the ticker symbol TERX, because it has not filed any periodic reports since the period ended July 31, 2013.

On August 19, 2015, a delinquency letter was sent by the Division of Corporation Finance to Li-ion Motors Corp. (a/k/a Terra Inventions Corp.) requesting compliance with its periodic filing obligations, but Li-ion Motors Corp. (a/k/a Terra Inventions Corp.) did not receive the delinquency letter due to its failure to maintain a valid address on file with the Commission as required by Commission rules (Rule 301 of Regulation S–T, 17 CFR 232.301 and Section 5.4 of EDGAR Filer Manual).

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PetroHunter Energy Corp. (CIK No. 1298824), a Maryland corporation with its principal place of business listed as Denver, Colorado with stock quoted on OTC Link under the ticker symbol PHUN, because it has not filed any periodic reports since the period ended June 30, 2013. On December 1, 2013, a delinquency letter was sent by the Division of Corporation Finance to PetroHunter Energy Corp. requesting compliance with its periodic filing obligations, and PetroHunter Energy Corp. received the delinquency letter on December 10, 2013, but failed to cure its delinquencies.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Shrink Nanotechnologies, Inc. (CIK No. 1355242), a void Delaware corporation with its principal place of business listed as Las Vegas, Nevada with stock quoted on OTC Link under the ticker symbol INKN, because it has not filed any periodic reports since the period ended March 31, 2013. On August 19, 2015, a delinquency letter was sent by the Division of Corporation Finance to Shrink Nanotechnologies, Inc. requesting compliance with its periodic filing obligations, but Shrink Nanotechnologies, Inc. did not receive the delinquency letter due to its failure to maintain a valid address on file with the Commission as required by Commission rules (Rule 301 of Regulation S–T, 17 CFR 232.301 and Section 5.4 of EDGAR Filer Manual).

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 11, 2016, through 11:59 p.m. EDT on May 24, 2016.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2016–11460 Filed 5–11–16; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting; Cancellation

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 81 FR 29314, May 11, 2016.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Friday, May 13, 2016 at 10:30 a.m.

CHANGES IN THE MEETING: The Closed Meeting scheduled for Friday, May 13, 2016 at 10:30 a.m., has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact Brent J. Fields of the Office of the Secretary at (202) 551–5400.

Dated: May 11, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–11533 Filed 5–11–16; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77787; File No. PCAOB–2016–01]

Public Company Accounting Oversight Board; Order Granting Approval of Proposed Rules To Require Disclosure of Certain Audit Participants on a New PCAOB Form and Related Amendments to Auditing Standards

May 9, 2016.

I. Introduction

On January 29, 2016, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 107(b)[1] of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") and Section 19(b)[2] of the Securities Exchange Act of 1934 (the "Exchange Act"), a proposal to adopt two new rules, a new form, and amendments to auditing standards to improve transparency regarding the engagement partner and other accounting firms that participate in issuer audits (collectively, the "Proposed Rules").[3] The Proposed Rules were published for comment in the **Federal Register** on February 16, 2016.[4] At the time the notice was issued, the Commission extended to May 16, 2016 the date by which the Commission should take action on the Proposed Rules.[5] The Commission received four comment letters in response to the notice.[6] This order approves the Proposed Rules.

II. Description of the Proposed Rules

On December 15, 2015, the Board adopted two new rules ("Rules 3210 and 3211") and Form AP to provide investors and other financial statement users with information about engagement partners and accounting firms that participate in audits of issuers.

A. Changes to PCAOB Rules and Forms

Under the Proposed Rules, for each audit report it issues for an issuer, a registered public accounting firm must file with the Board a report on Form AP that includes the following:

- The name of the engagement partner and Partner ID;[7]

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[1] 15 U.S.C. 7217(b).

[2] 15 U.S.C. 78s(b).

[3] The Board originally issued a concept release in 2009. *See Concept Release on Requiring the Engagement Partner to Sign the Audit Report,* PCAOB Release No. 2009–005 (July 28, 2009) ("Concept Release"), *available at http://pcaobus.org/Rules/Rulemaking/Docket029/2009-07-28_Release_No_2009-005.pdf.* In 2011, the Board issued proposed rules. *See Improving the Transparency of Audits: Proposed Amendments to PCAOB Auditing Standards and Form 2,* PCAOB Release No. 2011–007 (Oct. 11, 2011) ("Proposal"), *available at https://www.sec.gov/rules/pcaob/2016/34-77082.pdfhttp://pcaobus.org/Rules/Rulemaking/Docket029/PCAOB_Release_2011-007.pdf.* Subsequently, the Board issued a re-proposal in 2013. *See Improving the Transparency of Audits: Proposed Amendments to PCAOB Auditing Standards to Provide Disclosure in the Auditor's Report of Certain Participants in the Audit,* PCAOB Release No. 2013–009 (Dec. 4, 2013) ("Reproposal"), *available at http://pcaobus.org/Rules/Rulemaking/Docket029/PCAOB%20Release%20No%20%202013-009%20-%20Transparency.pdf.* In 2015, the Board issued a supplemental request for comment, which ultimately formed the framework for these Proposed Rules. *See Supplemental Request for Comment: Rules to Require Disclosure of Certain Audit Participants on a New PCAOB Form,* PCAOB Release No. 2015–004 (June 30, 2015) ("Supplemental Request"), *available at http://pcaobus.org/Rules/Rulemaking/Docket029/Release_2015_004.pdf.*

[4] *See* Release No. 34–77082 (Feb. 8, 2016), 81 FR 7927 (Feb. 16, 2016).

[5] Ibid.

[6] *See* letters to the Commission from CFA Institute, dated February 15, 2016 ("CFA Letter"); Tom Quaadman, Senior Vice President, Center for Capital Markets Competitiveness, U.S. Chamber of Commerce, dated March 3, 2016 ("Chamber Letter"); Deloitte & Touche LLP, dated March 4, 2016 ("Deloitte Letter"); and Michael R. McMurtry, CPA, dated March 18, 2016 ("McMurtry Letter").

[7] The firm is required to assign a 10-digit Partner ID number, beginning with the Firm ID (a unique

Continued

- For other accounting firms[8] participating in the audit for which the responsibility for the audit is not divided:
  - ○ 5% or greater participation: The name, city and state (or, if outside the United States, the city and country) of the headquarters' office, and, when applicable, the Firm ID, and the percentage of total audit hours attributable to each other accounting firm whose participation in the audit was at least 5% of total audit hours;[9]
  - ○ Less than 5% participation: The number of other accounting firms that participated in the audit whose individual participation was less than 5% of total audit hours, and the aggregate percentage of total audit hours of such firms; and
- For other accounting firms participating in the audit for which the responsibility for the audit is divided:
  - ○ The name, and when applicable, the Firm ID; city and state (or if outside the United States, the city and country) of the office of the other accounting firm that issued the other auditor's report; and the magnitude of the portion of the financial statements audited by the other accounting firm.

Form AP has a basic filing deadline of 35 days after the date the auditor's report is first included in a document filed with the Commission, with a shorter deadline of 10 days after the auditor's report is first included in a registration statement under the Securities Act of 1933 (the "Securities Act") filed with the Commission, such as for an initial public offering. Firms will file Form AP through the PCAOB's existing web-based Registration, Annual, and Special Reporting system.

B. Changes to PCAOB Standards

In addition to disclosing the required information on Form AP, the Proposed Rules allow an audit firm to voluntarily provide information about the engagement partner, other accounting firms, or both in the auditor's report. As a result, the Proposed Rules include amendments to PCAOB auditing standards AS 3101 (currently AU sec. 508), *Reports on Audited Financial Statements,* and AS 1205 (currently AU sec. 543), *Part of the Audit Performed by Other Independent Auditors*[10] to allow for voluntary reporting.

C. Applicability and Effective Date

The PCAOB has proposed application of the Proposed Rules to audits of all issuers, including audits of emerging growth companies ("EGCs"),[11] as discussed in Section IV. below. The Proposed Rules would not apply to audits of brokers and dealers under Exchange Act Rule 17a–5.[12] The Proposed Rules would be effective as follows:

(a) Disclosure of the engagement partner: auditors' reports issued on or after January 31, 2017; and

(b) Disclosure of other accounting firms: auditors' reports issued on or after June 30, 2017.

III. Comment Letters

As noted above, the Commission received four comment letters concerning the Proposed Rules. Two commenters expressed support for the Proposed Rules.[13] One commenter provided comments that were generally consistent with those provided by others throughout the PCAOB's rulemaking process and addressed by the PCAOB.[14]

In addition, one commenter raised concerns that it had previously raised in comment letters to the Board that: (a) The Proposed Rules were not liability neutral; and b) the substance of the economic analysis was insufficient to justify applying the Proposed Rules to audits of EGCs.[15] In addition, this commenter raised two additional issues, including that the 10-digit partner identifying number was not subject to a notice and comment period and a suggestion that the Proposed Rules should sunset after five years, unless a post implementation review finds that the Proposed Rules promote investor protection, capital formation and competition. The commenter stated that it expressed similar concerns in previous comment letters to the PCAOB, and in its opinion, those concerns have not been resolved by the PCAOB. We discuss each of these concerns below.

(a) Liability Neutrality

In the release accompanying the Proposed Rules ("Final Rule Release"), the Board noted that this commenter asserted that the Board should not pursue disclosure requirements for the engagement partner and other participants in the audit unless it can be done in a "liability neutral" way.[16] The Board explained that its purpose with the Proposed Rules is not to expose auditors to additional liability, and consistent with that purpose, it has endeavored to mitigate any additional liability consequences that may stem from the Proposed Rules. However, the Board also stated in the Final Rule Release that it does not agree with the premise that it should not seek to achieve the anticipated benefits of a new rule—here, increased transparency and accountability for key participants in the audit—unless it can be certain that its actions will not affect liability in any way. On the whole, the Board believes it has appropriately addressed concerns regarding liability consequences of its proposal in a manner compatible with the objectives of this rulemaking, and in view of the rulemaking's anticipated benefits.

Since the Concept Release, the Board has sought and considered commenters' views on the liability effect of its proposed amendments, has taken steps with the intent not to increase auditors' liability risk, and has tried to mitigate this possibility to the extent it would be consistent with its policy objectives. In the Reproposal, the Board included a detailed discussion on potential liability considerations of its proposed amendments, including liability under Section 11 of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b–5 thereunder. The Board has also indicated that it takes seriously commenters' concerns about the potential effects on auditor liability, has engaged in its own review of the relevant statutory provisions and case law and has kept the Commission staff advised of its thoughts on these issues, as commenters suggested.

The Board has specifically tailored the Proposed Rules to address, in part,

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five-digit number based on the number assigned to the firm by the PCAOB at the time of registration) followed by a unique series of five digits assigned by the firm.

[8] The Board defines "other accounting firm" as (i) a registered public accounting firm other than the firm filing Form AP; or (ii) any other person or entity that opines on the compliance of any entity's financial statements with an applicable financial reporting framework.

[9] Actual hours should be used if available. If actual audit hours are unavailable, the auditor may use a reasonable method to estimate the components of this calculation.

[10] On March 31, 2015, the PCAOB adopted the reorganization of its auditing standards using a topical structure and a single, integrated numbering system that was approved by the Commission on September 17, 2015. The reorganized amendments will be effective as of December 31, 2016, and nothing precludes auditors and others from using and referencing the reorganized standards before the effective date.

[11] The term "emerging growth company" is defined in Section 3(a)(80) of the Exchange Act. 15 U.S.C. 78c(a)(80).

[12] If the broker or dealer is an issuer, the Proposed Rules would apply.

[13] *See* CFA Letter and Deloitte Letter.

[14] *See* McMurtry Letter. The Commission believes that the Board has reasonably responded to these comments in its rulemaking process.

[15] *See* Chamber Letter.

[16] *See* comment letter of U.S. Chamber of Commerce's Center for Capital Markets Competitiveness, August 31, 2015 *available at http://pcaobus.org/Rules/Rulemaking/Docket029/031d_Chamber.pdf.* This letter was also referenced in the Chamber Letter.

potential liability considerations raised by commenters. In the Supplemental Request, the Board acknowledged that some commenters on the Reproposal expressed concern that identifying the engagement partner and other participants in the audit in the auditor's report could create both legal and practical issues under the federal securities laws by increasing the named parties' potential liability and by requiring their consent if the auditors' reports naming them were included in, or incorporated by reference into, registration statements under the Securities Act. The Board also acknowledged that some commenters expressed concerns about the possible litigation risk under Section 10(b) of the Exchange Act and Rule 10b–5 thereunder of the engagement partner's name appearing in the auditor's report. The Board further noted that many commenters urged the Board to proceed with the new disclosure requirements, if it determined to do so, by mandating disclosure on a newly created PCAOB form (or consider other alternative locations) as a means of responding to liability concerns. In response to these concerns, the Supplemental Request proposed disclosure on new Form AP, an alternative location outside the auditor's report, and specifically sought comment on whether disclosure on Form AP would mitigate commenters' concerns about liability-related consequences.

In the Final Rule Release, the Board further acknowledged commenters' concerns that public identification of key audit participants, particularly in the auditor's report, could impact the potential liability or litigation risks of those identified. In particular, the Board noted that it sought comment throughout the rulemaking process on various means of disclosure—from an engagement partner's signature on the auditor's report, to disclosure in the auditor's report, to disclosure on Form AP—in part to respond to those concerns. The Board stated that it believes the final rules accomplish its disclosure goals while appropriately addressing concerns raised by commenters about liability. The Board also observed that disclosure on Form AP should not raise potential liability concerns under Section 11 of the Securities Act or trigger the consent requirements of Section 7 of the Act because the engagement partner and other accounting firms would not be named in a registration statement or in any document incorporated by reference into one.[17] While the Board recognized that commenters expressed mixed views on the potential for liability under Exchange Act Section 10(b) and Rule 10b–5 and the ultimate resolution of Section 10(b) liability is outside its control, the Board stated that it does not believe any such risks warrant not proceeding with the Form AP approach.

The Commission believes that the Board has provided sufficient notice of potential liability consequences of the Proposed Rules, has provided sufficient opportunity for public comment on these issues, and has reasonably responded to such concerns. Specifically, the Commission believes the Board has appropriately considered concerns related to liability neutrality as part of the Final Rule Release and taken reasonable steps to address the comments raised with respect to liability considerations in the Proposed Rules.

(b) Economic Analysis

The Chamber Letter also suggested that the Board's economic analysis was insufficient to justify applying the Proposed Rules to audits of EGCs. This commenter, however, did not indicate why the economic analysis was insufficient, other than to say that the analysis and the application of the Proposed Rules to EGCs are "contrary to the intent of Congress [in passing the Jumpstart Our Business Startups Act]." The Board presented, and sought comment on, an economic analysis in the Reproposal. Further, in response to comments on the economic analysis provided in connection with the Reproposal, the Board revised its analysis, and sought comment on, an economic analysis as presented in the Supplemental Request. The economic analysis in the Supplemental Request set forth: (1) A description of the need for the standard-setting and how the Proposed Rules address that need; (2) the baseline to consider the economic impacts of the Proposed Rules; (3) the economic impacts of the Proposed Rules including benefits, costs, effects on different categories of audit firms and smaller companies, and responses to comments received on the economic analysis included with the Reproposal; and (4) economic considerations pertaining to audits of EGCs, including efficiency, competition and capital formation. In its Final Rule Release, the Board further discussed the economic considerations of the Proposed Rules and included a separate discussion within the economic analysis devoted to potential liability consequences.

The Commission notes that the Board provided a qualitative analysis that took into account the views of commenters. As the Board explained, there was limited research and data available regarding economic costs and benefits of the Proposed Rules for U.S. companies, making reliable quantification difficult. As the Board further explained, as part of its rulemaking process through the issuance of the Proposed Rules, the Board requested input from commenters. While commenters provided views on issues pertinent to economic considerations, including potential benefits and costs, they did not provide empirical data. The Commission believes that the Board's economic analysis reasonably addresses the comments raised and, as further discussed below, is sufficient to make a determination to apply the Proposed Rules to the audits of EGCs.

(c) 10-Digit Partner Identifying Number

The Chamber Letter also noted that the Board added the 10-digit partner identifying number as part of the Final Rule Release without subjecting it to notice and comment. The Board added the 10-digit partner identifying number to the Proposed Rules in response to suggestions made by two commenters on the Supplemental Request.[18] These commenters suggested that a unique partner identifier would help unambiguously identify partners and provide clear identification of auditors with the same or similar names. The Commission's own notice and comment period on the Proposed Rules provided an opportunity for commenters to address concerns they may have had with the partner identifying number. No commenter identified any substantive concerns with the application of the identifying number. The Commission believes that the feedback received by the Board on the Supplemental Request and the opportunity for public comment on the Commission's notice of the Proposed Rules provide sufficient basis for the Board to include the 10-digit partner identifying number in the Proposed Rules.

(d) Sunset Provision

Finally, the Chamber Letter also suggested that the Proposed Rules should sunset after five years, unless a post implementation review finds that the Proposed Rules promote investor protection, capital formation and competition. The Board stated in the Final Rule Release that it has considered feedback received on the concept release issued by the Commission on Possible Revisions to Audit Committee Disclosures ("SEC Concept Release")[19] in developing the Proposed Rules. It also stated that it will continue to monitor the provisions included in the Proposed Rules to determine if revisions should be made in the future. In addition, the Board has a process in place to perform post-implementation reviews for its standards and rules.[20] Therefore, the Commission does not believe a specific sunset provision is necessary in the Proposed Rules.

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[17] This assumes the auditor does not voluntarily choose to do so by including relevant disclosures in the auditor's report.

[18] *See* letters from the Auditing Standards Committee of the Auditing Section of the American Accounting Association, dated August 30, 2015, available at *http://pcaobus.org/Rules/Rulemaking/Docket029/024d_AAA.pdf* and Maureen McNichols, dated August 31, 2015, *available at http://pcaobus.org/Rules/Rulemaking/Docket029/037d_McNichols.pdf.*

IV. The PCAOB's EGC Request

Section 103(a)(3)(C) of the Sarbanes-Oxley Act requires that any rules of the Board "requiring mandatory audit firm rotation or a supplement to the auditor's report in which the auditor would be required to provide additional information about the audit and the financial statements (auditor discussion and analysis)" shall not apply to an audit of an EGC. The Board's Proposed Rules do not fall into this category of rules.[21] Section 103(a)(3)(C) further provides that "[a]ny additional rules" adopted by the PCAOB after April 5, 2012 do not apply to EGCs "unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation." The Proposed Rules fall within this category of additional rules and thus the Commission must make a determination under the statute about the applicability of the Proposed Rules to EGCs. Having considered those statutory factors, and as explained further herein, the Commission finds that applying the Proposed Rules to audits of EGCs is necessary or appropriate in the public interest.

In proposing application of the Proposed Rules to audits of all issuers, including EGCs, the PCAOB requested that the Commission make the determination required by Section 103(a)(3)(C). To assist the Commission in making its determination, the PCAOB prepared and submitted to the Commission its own EGC analysis. The PCAOB's EGC analysis includes discussions of characteristics of self-identified EGCs and economic considerations pertaining to audits of EGCs, including efficiency, competition, and capital formation.

In its analysis, the Board states, with support from commenters, that requiring the same disclosures for audits of EGCs as for all issuers would provide the same general benefits to investors in EGCs as would be applicable to investors in non-EGCs. On the cost side, the Board does not believe that compliance costs for auditors will be significant. Rather, based on the overall characteristics of EGCs, the Board believes it is unlikely that the cost of collecting data to comply with the Proposed Rules will be disproportionately high for EGCs as a group. Further, the Board's analysis notes that commenters generally indicated they were not aware of any significant costs that would be specific to audits of EGCs when compared to the costs of non-EGC audits.

The PCAOB's EGC analysis was included in the Commission's public notice soliciting comment on the Proposed Rules. Based on the analysis submitted, we believe the information in the record is sufficient for the Commission to make the requested EGC determination in relation to the Proposed Rules. The Commission also takes note, in particular, of the PCAOB's approach to the Proposed Rules, which are not intended to substantively change auditor performance requirements; should reduce investors' search costs since the information will be provided in one place in a searchable database; and have been developed in a way to mitigate potential increases in auditor liability. In addition, the auditor's requirements under the new standard are focused on communicating the characteristics of the auditor, of which the auditor is already aware or can readily obtain.

V. Conclusion

The Commission has carefully reviewed and considered the Proposed Rules and the information submitted therewith by the PCAOB, including the PCAOB's EGC analysis, and the comment letters received. In connection with the PCAOB's filing and the Commission's review,

A. The Commission finds that the Proposed Rules are consistent with the requirements of the Sarbanes-Oxley Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors; and

B. Separately, the Commission finds that the application of the Proposed Rules to EGC audits is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation.

It is therefore ordered, pursuant to Section 107 of the Sarbanes-Oxley Act and Section 19(b)(2) of the Exchange Act, that the Proposed Rules (File No. PCAOB–2016–01) be and hereby are approved.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2016–11292 Filed 5–12–16; 8:45 am]

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[19] *See Possible Revisions to Audit Committee Disclosures,* Release No. 33–9862 (July 1, 2015), *available at: http://www.sec.gov/rules/concept/2015/33-9862.pdf.*

[20] *See PCAOB Requests Comment on Engagement Quality Review Standard Under New Post-Implementation Review Program,* PCAOB News Release (Apr. 6, 2016), *available at http://pcaobus.org/News/Releases/Pages/2016-request-for-comment-AS7-center-post-implementation-review.aspx.*

[21] While the precise scope of this category of rules under Section 103(a)(3)(C) is not entirely clear, we do not interpret this statutory language as precluding the application of Board rules requiring additional factual information about the engagement partner and certain audit participants to the audits of EGCs. In our view, this approach reflects an appropriate interpretation of the statutory language and is consistent with our understanding of the Congressional purpose underlying this provision.

SECURITIES AND EXCHANGE COMMISSION

In the Matter of GroveWare Technologies Ltd., Luve Sports, Inc., and Northcore Technologies, Inc., File No. 500–1; Order of Suspension of Trading

May 11, 2016.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of GroveWare Technologies Ltd. (CIK No. 1484931), a revoked Nevada corporation with its principal place of business listed as Toronto, Ontario, Canada with stock quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link") under the ticker symbol GROV, because it has not filed any periodic reports since the period ended March 31, 2013. On August 18, 2015, a delinquency letter was sent by the Division of Corporation Finance to GroveWare Technologies Ltd. requesting compliance with its periodic filing obligations, but GroveWare Technologies Ltd. did not receive the delinquency letter due to its failure to maintain a valid address on file with the Commission as required by Commission rules (Rule 301 of Regulation S–T, 17 CFR 232.301 and Section 5.4 of EDGAR Filer Manual).

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Luve Sports, Inc. (CIK No. 1497421), a revoked Nevada corporation with its principal place of business listed as Zapopan, Jalisco, Mexico with stock quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link") under the ticker symbol LUVE, because it has not filed any periodic reports since the period ended June 30, 2013. On August 18, 2015, a delinquency letter was sent by the Division of Corporation Finance to Luve Sports, Inc. requesting compliance with its periodic filing obligations, but Luve Sports, Inc. did not receive the delinquency letter due to its failure to maintain a valid address on file with the Commission as required by Commission rules (Rule 301 of Regulation S–T, 17 CFR 232.301 and Section 5.4 of EDGAR Filer Manual).

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Northcore Technologies, Inc. (CIK No. 1079171), an Ontario corporation with its principal place of business listed as Toronto, Ontario, Canada with stock quoted on OTC Link under the ticker symbol NTLNF, because it has not filed any periodic reports since the period ended December 31, 2012. On August 18, 2015, a delinquency letter was sent by the Division of Corporation Finance to Northcore Technologies, Inc. requesting compliance with its periodic filing obligations, but Northcore Technologies, Inc. did not receive the delinquency letter due to its failure to maintain a valid address on file with the Commission as required by Commission rules (Rule 301 of Regulation S–T, 17 CFR 232.301 and Section 5.4 of EDGAR Filer Manual).

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 11, 2016, through 11:59 p.m. EDT on May 24, 2016.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2016–11459 Filed 5–11–16; 4:15 pm]

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SECURITIES AND EXCHANGE COMMISSION

Release No. 34–77786; File No. SR–FINRA–2016–014]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to National Adjudicatory Council Composition, Member Terms and Election Procedures

May 9, 2016.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 28, 2016, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the By-Laws of FINRA's regulatory subsidiary, FINRA Regulation, Inc. ("FINRA Regulation"), to expand the size of the National Adjudicatory Council ("NAC") to 15 members, with the number of non-industry members exceeding the number of industry members; lengthen the terms of office of future NAC members to four years; and update the process used for sending and counting ballots in the event of a contested nomination and election to fill certain NAC industry member seats.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

In 2007, as part of the consolidation of the member firm regulatory functions of National Association of Securities Dealers, Inc. ("NASD") and NYSE Regulation, Inc. into a combined organization, FINRA, the SEC approved changes to the NASD By-Laws that, among other things, included a governance structure that apportioned public and industry representation on the FINRA Board of Governors ("FINRA Board") and designated seven governor seats to represent member firms of various sizes based on the criteria of firm size.[3] As a result of these changes, the By-Laws of FINRA ("FINRA By-Laws") require that the FINRA Board consist of no fewer than 16 and no more than 25 governors.[4] They provide also that the number of Public Governors serving on the FINRA Board shall exceed the number of Industry Governors.[5]

The FINRA Board consists currently of 24 governors, including 13 Public Governors, 10 Industry Governors and FINRA's chief executive officer.[6] The ten Industry Governors include a Floor Member Governor, an Independent Dealer/Insurance Affiliate Governor, an Investment Company Affiliate Governor and seven governors that are subject to election to the FINRA Board by member broker-dealers based on the criteria of firm size—three Small Firm Governors, one Mid-Size Firm Governor and three Large Firm Governors.[7]

The National Adjudicatory Council

The NAC acts on behalf of FINRA in several capacities and its powers are authorized by the By-Laws of FINRA

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007), as amended by Securities Exchange Act Release No. 56145A (May 30, 2008), 73 FR 32377 (June 6, 2008) (Order Approving File No. SR–NASD–2007–023).

[4] *See* FINRA By-Laws, Article VII, Section 4 (Composition and Qualifications of the Board), paragraph (a).

[5] *Supra* note 4.

[6] *Supra* note 4. The number of Public Governors is determined by the FINRA Board.

[7] *Supra* note 4.

Regulation ("FINRA Regulation By-Laws") and FINRA's Code of Procedure.[8] The NAC presides over disciplinary matters appealed to or called for review by the NAC.[9] The NAC also acts, when requested, in statutory disqualification and membership proceedings; considers the appeals of members seeking exemptive relief; and retains the authority to review decisions proposed in other proceedings as set forth in the Code of Procedure.[10] For most matters that the NAC considers, it prepares a proposed written decision, which becomes final FINRA action if the Board does not call the matter for review.[11]

The FINRA Regulation By-Laws establish the composition of the NAC, the terms of its members, and the process by which members are selected. The NAC is composed currently of 14 members.[12] The number of Non-Industry Members, which must include at least three Public Members, equals the number of Industry Members.[13] The seven Industry Members include two Small Firm NAC Members, one Mid-Size Firm NAC Member, two Large Firm NAC Members and two at-large Industry Members.[14]

The FINRA Board appoints the NAC and its members.[15] The FINRA Board appoints Non-Industry Members and at-large Industry Members from candidates recommended by the Nominating Committee. The FINRA Board also appoints Small Firm, Mid-Size Firm and Large Firm NAC Members, either from candidates recommended by the Nominating Committee, or in the event of a contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member vacancy, the candidate that results from an election in which FINRA members have an opportunity to vote directly for a candidate based on firm size.[16] The Small Firm, Mid-Size Firm or Large Firm NAC Member candidate receiving the largest number of votes from firms of corresponding size is declared the nominee, and the Nominating Committee sends a written certification of the results to the FINRA Board and nominates such candidate for appointment to the NAC.[17]

Discussion of the Proposed Rule Change

The proposed rule change would amend the FINRA Regulation By-Laws in three principal ways. First, the proposed rule change would make a limited modification to the NAC's composition and align it more closely with that of the FINRA Board. Second, the proposed rule change would lengthen the terms of future NAC members to encourage consistency and continuity in NAC decision making. Finally, the proposed rule change would modernize the selection process used in the event of a contested nomination and election for certain industry member NAC seats by permitting new balloting methods and streamlining the process by which ballots are counted.

Proposal To Change the Composition of the NAC

The proposed rule change would amend Section 5.2 of the FINRA Regulation By-Laws to expand the size of the NAC to 15 members and apply the requirement that the NAC have more Non-Industry Members, including three Public Members, than Industry Members, thus following closely the requirement that exists in the FINRA By-Laws that the number of Public Governors on the FINRA Board exceed the number of Industry Governors.[18] FINRA proposed, and the SEC approved, the current FINRA Board governance structure to strike an appropriate balance between the necessity for overall independence of the FINRA Board and the desire for substantial, meaningful and diverse industry representation in FINRA's governing process.[19] The condition that the number of Public Governors exceed the number of Industry Governors permits the FINRA Board to consider the needs of the entire securities industry, including issuers, large and small investors and securities firms and their professionals, while at the same time broadly assuring the independence of FINRA's regulatory function.[20]

Under the proposed rule change, the NAC would consist of 15 members, including eight Non-Industry Members and seven Industry Members. FINRA would thus achieve the objective of a majority non-industry NAC by adding one Non-Industry Member seat to the current 14-member committee. Requiring that the number of Non-Industry Members exceed the number of Industry Members will enhance overall the independence of the NAC and reinforce the integrity of the NAC as an impartial and fair adjudicatory body.

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[8] *See* FINRA Regulation By-Laws, Article V, Section 5.1 (Authority); *see also* FINRA Rule 9000 Series.

[9] *See generally* FINRA Rule 9300 Series. FINRA's disciplinary process begins with its Department of Enforcement or Department of Market Regulation filing a complaint with the Office of Hearing Officers that alleges a member or person associated with a member is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and related regulations. *See* FINRA Rule 9212. When requested, trial-level hearings take place before a Hearing Panel or an Extended Hearing Panel, which listens to the presentation of evidence and issues a written decision setting forth findings as to whether a respondent engaged in the alleged misconduct and describing the sanctions, if any, imposed. *See* FINRA Rule 9221; *see generally* FINRA Rule 9260 Series. A respondent or the Department of Enforcement or Market Regulation may appeal a disciplinary decision to the NAC. *See* FINRA Rule 9311. In the absence of an appeal, a decision may be subject to NAC review if called for review by any member of the NAC, any member of the NAC's Review Subcommittee, or in the event of a default, the General Counsel. *See* FINRA Rule 9312.

[10] *See* FINRA Rule 9524; NASD Rule 1015; FINRA Rule 9630; FINRA Rule 9559; FINRA Rule 9760.

[11] *See* FINRA Rule 9349.

[12] *See* FINRA Regulation By-Laws, Article V, Section 5.2 (Number of Members and Qualifications), paragraph (a).

[13] *Supra* note 12. A "Non-Industry Member" of the NAC includes any Public Member, an officer or employee of an issuer of securities listed on a market for which FINRA provides regulation, an officer or employee of an issuer of unlisted securities that are traded in the over-the-counter market, or any individual who would not otherwise fall within the definition of an Industry Member. *See* FINRA Regulation By-Laws, Article I, paragraph (ee). A "Public Member" is a Non-Industry Member who has no material business relationship with a broker or dealer or a self-regulatory organization registered under the Act. *See* FINRA Regulation By-Laws, Article I, paragraph (hh). An "Industry Member" includes a person who is or served in the prior year as an officer, director, employee or controlling person of a broker-dealer; is an officer, director or employee of an entity that owns a material equity interest in a broker-dealer; owns personally a material equity interest in a broker-dealer; provides professional services to broker-dealers, or to a director, officer, or employee of a broker-dealer in their professional capacity, where the revenues from such services meet material thresholds; or is or served in the prior year as a consultant, employee or provider of professional services to a self-regulatory organization registered under the Act. *See* FINRA Regulation By-Laws, Article I, paragraph (x).

[14] *Supra* note 12.

[15] *See* FINRA Regulation By-Laws, Article V, Section 5.3 (Appointments).

[16] *Supra* note 15. A person who has not been nominated by the Nominating Committee may be included on a ballot for election to fill an open Small Firm, Mid-Size Firm or Large Firm NAC Member seat by contesting the Nominating Committee's nominee after successfully petitioning for inclusion on the ballot. *See* FINRA Regulation By-Laws, Article VI, Section 6.2 (Designation of Additional Candidates).

[17] *See* FINRA Regulation By-Laws, Article VI, Section 6.13 (Certification of Nomination). The FINRA Board is required to appoint to the NAC the candidate who receives the most votes in any contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member seat. *See* FINRA Regulation By-Laws Article V, Section 5.5 (Rejection of Nominating Committee Nominee).

[18] Although the terms "Non-Industry Member" and "Public Governor" are not by their definitions exact analogs, both terms are comparable in excluding from their definitions any person who has a material business relationship or interests that align closely with a FINRA member broker-dealer or a self-regulatory organization registered under the Act. *Compare* FINRA Regulation By-Laws, Article I, paragraph (ee), *with* FINRA By-Laws, Article I, paragraph (tt).

[19] *See supra* note 3.

[20] *See supra* note 3.

Proposal To Change NAC Member Terms

The proposed rule change would also lengthen the terms of office of future NAC members. NAC members are divided currently into three classes, with members serving three-year terms of office that commence and expire on a staggered, annual basis.[21] Consequently, approximately one-third of the NAC members complete their service in a particular year and are replaced with newly appointed members. This represents a significant amount of turnover annually and risks undermining the cohesion and continuity of the NAC as an adjudicatory body.

The proposed rule change would amend Section 5.6 of the FINRA Regulation By-Laws to extend by one year, to four total years, the terms of new NAC members.[22] This would result in a NAC that is divided into four classes, rather than the current three, that are as equal in number as feasible.[23] Extending to four years the term of each NAC member will allow for greater utilization of the unique skills and expertise of each member, diminish the risk associated with recurrent losses of institutional knowledge and provide FINRA more opportunity to recoup over a longer period of time its investment in training NAC members to fulfill their roles as adjudicators.[24]

Proposal To Change the NAC Selection Process

Finally, the proposed rule change would make limited, procedural and administrative modifications to the NAC selection process. The proposed changes would make the NAC election process streamlined, accessible and align it with the process used currently for elections involving the FINRA District Committees.

The FINRA Regulation By-Laws, as currently written, require that the Nominating Committee prepare and deliver by mail, in the event of a contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member seat, a ballot with the names of the candidates standing for election, and a FINRA member eligible to vote based on their firm size must return the ballot envelope by mail with a postmark bearing a date on or before the return date specified on the ballot.[25] The proposed rule change would amend Section 6.7 of the FINRA Regulation By-Laws to delete language that suggests that voting by paper ballot is the sole method of voting in contested NAC elections and recognize the delivery of ballots by other efficient, contemporary means.[26] The proposed rule change would align the ballot preparation process in NAC elections with that permitted currently in FINRA District Committee elections and allow FINRA members to vote using online and telephonic methods in addition to paper ballots.[27]

The proposed rule change would also amend Section 6.10 of the FINRA Regulation By-Laws to simplify the tabulation of ballots by the Independent Agent. The proposed rule change would eliminate the provision in Section 6.10 of the FINRA Regulation By-Laws that permits NAC candidates and their representatives to observe the Independent Agent's accounting of ballots in contested NAC elections. The proposed rule change would align the ballot counting process used in NAC elections with the process used in FINRA District Committee elections, which does not provide candidates the ability to be present while the Independent Agent opens and counts the ballots.[28] The proposed rule change will allow the Independent Agent to expedite the accounting process and permit the Secretary of FINRA to notify the candidates more quickly of NAC election results.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(8) of the Act,[29] which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members. FINRA believes that the proposed rule change, consistent with this purpose of the Act, assures that disciplinary appeals and other matters considered by the NAC will continue to be heard and resolved by a NAC that is composed of members with a diversity of expertise, experiences and perspectives that fosters making fair decisions and, where necessary, imposing appropriately remedial sanctions.

FINRA believes further that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[30] which requires, among other things, that FINRA Rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest. FINRA believes that making a limited modification to the NAC's composition to align it more closely with that of the FINRA Board will enhance overall the independence of the NAC as an adjudicatory body. Ensuring that the NAC has a majority of Non-Industry Members emphasizes the importance of the unique, balanced perspectives that are valued in NAC deliberations and aid in its ability to address issues in a neutral fashion. FINRA believes that adding one Non-Industry Member seat to the NAC confirms that a diversity of views is represented in the NAC's opinions.

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[21] *See* FINRA Regulation By-Laws, Article V, Section 5.6 (Term of Office), paragraphs (a) and (b).

[22] The proposed rule change would not alter or extend the term of any NAC member serving currently but would affect instead the term of any NAC member appointed to serve by the FINRA Board after the effective date of the rule change.

[23] The proposed rule change would amend Section 5.6(a) of the FINRA Regulation By-Laws to provide a three-year transitional period during which the FINRA Board may appoint new NAC members to terms of office less than four years to achieve the staggering necessary to divide the NAC into four classes. FINRA anticipates that, beginning in January 2017, and ending in December 2019, new NAC members shall be appointed to terms of either three years or four years to achieve the result of a NAC that is divided into four classes, with each NAC member serving a term of four years. The proposed rule change would also make a conforming amendment to Section 5.6(b) of the FINRA Regulation By-Laws to delete obsolete text related to a prior rule change that replaced region-based Industry NAC members with Industry members that represent FINRA member firms of various sizes. *See* Securities Exchange Act Release No. 58909 (November 6, 2008), 73 FR 68467 (November 18, 2008) (Order Approving File No. SR–FINRA–2008–046).

[24] A NAC member, absent a limited exception, may not serve consecutive terms. *See* FINRA Regulation By-Laws, Article V, Section 5.6 (Term of Office), paragraph (c). The proposed rule change would make a conforming amendment to this By-Law provision.

[25] *See* FINRA Regulation By-Laws, Article VI, Section 6.7 (Ballots).

[26] The proposed rule change would also make a conforming amendment to Section 6.9 of the FINRA Regulation By-Laws concerning ballots that are returned as undelivered.

[27] *See* FINRA Regulation By-Laws, Article VIII, Section 8.11 (Ballots).

[28] *See* FINRA Regulation By-Laws, Article VIII, Section 8.14 (General Procedures for Qualification and Accounting of Ballots). The opportunity to observe the Independent Agent's qualification and accounting of ballots is one which NAC candidates have infrequently availed themselves and provides candidates no additional grounds for recourse. Candidates and their representatives are not allowed to see the vote of any FINRA member and the final determination of the qualification of a ballot rests with the Secretary of the Corporation. *See* FINRA Regulations By-Laws, Article VI, Section 6.10 (General Procedures for Qualification and Accounting of Ballots). The proposed rule change does not alter the requirement that the Secretary of the Corporation certify election results. *See* FINRA Regulation By-Laws, Article VI, Section 6.13 (Certification of Nomination).

[29] 15 U.S.C. 78*o*–3(b)(8).

[30] 15 U.S.C. 78*o*–3(b)(6).

FINRA believes also that the proposed rule change is consistent with the provisions of Section 15A(b)(4) of the Act,[31] which requires, among other things, that FINRA rules assure a fair representation of its members in the administration of its affairs. Although the proposed rule change would make a limited change to the NAC's composition, it would nevertheless continue FINRA's custom of substantial industry participation in FINRA's adjudicatory process and would not dilute the critically important involvement of FINRA members and their associated persons in NAC deliberations. Under the proposed rule change, the opportunity for FINRA members to vote on five designated Industry Member NAC seats based on firm size—two Small Firm, one Mid-Size Firm and two Large Firm Member seats—is unaltered. The right of FINRA members to elect a total of five Industry Members to the NAC, one-third of all members, based on firm size is consistent with the Act's fair representation requirement.[32] The proposed rule change will also result in a more accessible NAC election process, which FINRA believes will assure a fair representation of its members on the NAC.[33]

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is intended solely to enhance impartiality and integrity in FINRA's process for reviewing appeals of disciplinary and other decisions concerning member firms and their associated persons, and will lead to efficiencies in the process by which some NAC members are elected to the NAC by allowing contemporary balloting methods and expediting the process by which ballots are counted. FINRA does not believe that there are any material economic impacts associated with the proposed rule change.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2016–014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2016–014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2016–014, and should be submitted on or before June 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–11295 Filed 5–12–16; 8:45 am]

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[31] 15 U.S.C. 78*o*–3(b)(4).

[32] The Commission has found the similar composition requirements of the FINRA Board to meet the statutory requirements of Section 15A(b)(4) of the Act. *See supra* note 3.

[33] The Commission has found that the processes used currently for FINRA District Elections, processes with which those used in NAC elections would be aligned under the proposed rule change, are consistent with the statutory requirements of the Act. *See* Securities Exchange Act Release No. 64363 (April 28, 2011), 76 FR 25397 (May 4, 2011) (Order Approving File No. SR–FINRA–2011–011).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77784; File No. SR–BatsBZX–2016–14]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees as They Apply to the Equity Options Platform

May 9, 2016.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 2, 2016, Bats BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BZX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to the Exchange's equity options platform ("BZX Options") to: (1) Modify the standard fee for Non-Customer [6] orders that remove liquidity in Non-Penny Pilot Securities [7] and to adopt a new tier in connection with such executions; (2) modify an existing tier and add a new tier to its tiered pricing structure for the Exchange's Quoting Incentive Program ("QIP"); and (3) simplify the Exchange's routing fees, as further described below.

Non-Customer Orders That Remove Liquidity in Non-Penny Pilot Securities

The Exchange is proposing to modify the standard fee for Non-Customer orders that remove liquidity in Non-Penny Pilot Securities. Such orders when executed on the Exchange currently yield fee code NP and are assessed a standard fee of $0.94 per contract. The Exchange is proposing to increase the standard fee for Non-Customer orders that remove liquidity in Non-Penny Pilot Securities under fee code NP from $0.94 to $0.99 per contract.

In addition, the Exchange proposes to adopt a new tier that would apply to Non-Customer orders that remove liquidity in Non-Penny Pilot Securities that result in a reduced fee for Members that meet the qualifications of the tier. Specifically, the Exchange is proposing to create a new footnote 13 entitled "Non-Customer Non-Penny Pilot Take Volume Tier," which would apply to orders that receive fee code NP. Under the proposed new tier, Non-Customer orders that remove liquidity in Non-Penny Pilot Securities would be assessed a reduced fee of $0.95 per contract where the Member has: (1) an ADAV [8] in Customer orders in Non-Penny Pilot Securities equal to or greater than 0.05% of average TCV; [9] and (2) an ADV [10] in Non-Customer Orders that remove liquidity in Non-Penny Pilot Securities equal to or greater than 0.10% of average TCV.

In addition to the modification to the Fee Codes and Associated Fees table and the addition of footnote 13 described above, the Exchange proposes to update the Standard Rates table of the fee schedule to reflect these changes.

QIP Tiers

The Exchange currently offers three QIP tiers that provide an additional rebate per contract for an order that adds liquidity to the BZX Options Book [11] in options classes in which a Member is a Market Maker registered on BZX Options pursuant to Rule 22.2. The Market Maker must be registered with BZX Options in an average of 20% or more of the associated options series in a class in order to qualify for QIP rebates for that class. The Exchange proposes to amend QIP Tier 3 and to add a new QIP Tier 4, as further described below.

Under QIP Tier 3, a Market Maker receives an additional rebate of $0.06 per contract where that Market Maker has an ADV equal to or greater than 2.5% of average TCV. The Exchange proposes to decrease the rebate provided pursuant to QIP Tier 3 from an additional rebate of $0.06 per contract to an additional rebate of $0.05 per contract. The Exchange does not propose to amend the qualifying criteria for QIP Tier 3.

In addition, the Exchange proposes to adopt new QIP Tier 4. Under proposed QIP Tier 4, a Market Maker will receive an additional rebate of $0.06 per contract where the Member has an ADV equal to or greater than 3.5% of average TCV. Thus, QIP Tier 4 will provide the same rebate as is provided under current QIP Tier 3.

Routing Fees

The Exchange proposes to modify the fees charged for orders routed away from the Exchange and executed at various away options exchanges. The Exchange currently has specific rates and associated fee codes for each away options exchange.[12] Such rates are further divided at each options exchange into either two categories in order to differentiate between Customer and Non-Customer orders or into four categories in order to differentiate between Customer and Non-Customer orders and then into Penny Pilot Securities [13] and Non-Penny Pilot Securities.[14] In order to simplify routing fees for executions at away options exchanges, the Exchange proposes to charge flat rates for routing to other options exchanges that have been placed into groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.,* clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, "Routing Costs"). To address different fees at various other options exchanges, the Exchange proposes to adopt five different fees and associated fee codes applicable to routing to away options exchanges, as further described below.

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[4] 17 CFR 240.19b–4(f)(2).

[5] The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." *See* Exchange Rule 1.5(n).

[6] The term "Non-Customer" applies to any transaction that is not a Customer order. In turn, the term "Customer" applies to any transaction identified by a Member for clearing in the Customer range at the Options Clearing Corporation ("OCC"), excluding any transaction for a Broker Dealer or a "Professional" as defined in Exchange Rule 16.1.

[7] The term "Non-Penny Pilot Security" applies to those issues that are not Penny Pilot Securities quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01.

[8] "ADAV" means average daily volume calculated as the number of contracts added per day.

[9] "TCV" means total consolidated volume calculated as the volume reported by all exchanges to the consolidated transaction reporting plan for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

[10] "ADV" means average daily volume calculated as the number of contracts added or removed, combined, per day.

[11] "BZX Options Book" is defined as "the electronic book of options orders maintained by the Trading System. *See* Exchange Rule 16.1(a)(9).

[12] Other options exchanges to which the Exchange routes include: BOX Options Exchange LLC ("BOX"), Chicago Board Options Exchange, Inc. ("CBOE"), C2 Options Exchange, Inc. ("C2"), Bats EDGX Exchange, Inc. ("EDGX Options"), International Securities Exchange, Inc. ("ISE"), ISE Gemini, LLC ("ISE Gemini"), ISE Mercury, LLC ("ISE Mercury"), Miami International Securities Exchange, LLC ("MIAX"), Nasdaq Options Market LLC ("NOM"), Nasdaq OMX BX LLC ("BX Options"), Nasdaq OMX PHLX LLC ("PHLX"), NYSE Arca, Inc. ("ARCA"), and NYSE MKT LLC ("AMEX").

[13] The term "Penny Pilot Security" applies to those issues that are quoted pursuant to Exchange Rule 21.5, Interpretation and Policy .01.

[14] The Exchange notes that it still applies a single rate for orders routed to and executed at the newest options exchange, ISE Mercury.

With respect to Non-Customer orders, the Exchange proposes to adopt two fee codes: (1) Fee code RN, which would result in a fee of $0.85 per contract and would apply to all Non-Customer orders in Penny Pilot Securities; and (2) fee code RO, which would result in a fee of $1.20 per contract and would apply to all Non-Customer orders in Non-Penny Pilot Securities. The Exchange notes that the current range of fees applicable to Non-Customer orders routed to other options exchanges is from $0.56 per contract (fee code RF, applicable to Non-Customer orders in Penny Pilot Securities executed at EDGX Options) to $1.25 per contract (fee code QG, applicable to Non-Customer orders executed at NOM in Non-Penny Pilot Securities).

With respect to Customer orders, the Exchange proposes to adopt three fee codes: (1) Fee code RP, which would result in a fee of $0.25 per contract and would apply to all Customer orders routed to and executed at AMEX, BOX, BX Options, CBOE, EDGX Options, ISE Mercury, MIAX or PHLX; (2) fee code RQ, which would result in a fee of $0.70 per contract and would apply to all Customer orders in Penny Pilot Securities routed to and executed at ARCA, C2, ISE, ISE Gemini or NOM; and (3) fee code RR, which would result in a fee of $0.90 per contract and would apply to all Customer orders in Non-Penny Pilot Securities routed to and executed at ARCA, C2, ISE, ISE Gemini or NOM. The Exchange notes that the current range of fees applicable to Customer orders routed to other options exchanges is from no charge per contract (fee codes BD, applicable to Customer orders in Non-Penny Pilot Securities executed at BX Options, and fee codes RC and RD, applicable to Customer orders in Penny Pilot Securities and Non-Penny Pilot Securities, respectively, executed at EDGX Options) to $0.90 per contract (fee codes AD, GD and QD, applicable to Customer orders executed at ARCA, ISE Gemini, and NOM, respectively, in Non-Penny Pilot Securities).[15]

As a general matter, the groupings described above in most instances attempt to differentiate between the Routing Costs applicable to either executions of orders in Penny Pilot Securities versus those in Non-Penny Pilot Securities or between fee ranges typical of exchanges that operate primarily a maker/taker or price/time market model (generally imposing higher fees, including for Customer orders) versus exchanges that operate primarily a pro rata or customer priority market model (generally imposing lower fees, especially for Customer orders).

As set forth above, the Exchange's proposed approach to routing fees is to set forth in a simple manner certain flat fees that approximate the cost of routing to other options exchanges. The Exchange will then monitor the fees charged as compared to the costs of its routing services, as well as monitoring for specific fee changes by other options exchanges, and intends to adjust its flat routing fees and/or groupings to ensure that the Exchange's fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. Although there may be instances where the Exchanges fee to a particular options exchange is indeed significantly higher than the fee charged by such options exchange, the Exchange believes that this is appropriate for several reasons discussed in further detail below, including the simplicity that it will provide Users of the Exchange's routing services.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule immediately.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of section 6 of the Act.[16] Specifically, the Exchange believes that the proposed rule change is consistent with section 6(b)(4) of the Act,[17] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive.

Volume-based rebates such as those currently maintained on the Exchange have been widely adopted by options exchanges, including the Exchange, and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and introduction of higher volumes of orders into the price and volume discovery processes.

The Exchange believes that its proposal to change the standard fee charged for Non-Customer orders that remove liquidity in Non-Penny Pilot Securities under fee code NP from $0.94 to $0.99 per contract is reasonable, fair and equitable and non-discriminatory, because the change will apply equally to all participants, and because, while the change marks an increase in fees for orders in Non-Penny Pilot Securities, such proposed fees remain consistent with pricing previously offered by the Exchange as well as competitors of the Exchange and does not represent a significant departure from the Exchange's general pricing structure and will allow the Exchange to earn additional revenue that can be used to offset the addition of new pricing incentives, including those introduced as part of this proposal. The Exchange also believes that its proposal to adopt a tiered pricing structure that will result in a reduced fee for all Members qualifying for the tier mitigates the increased fee. The tier is itself reasonable, fair and equitable and non-discriminatory for the reasons set forth above with respect to volume-based pricing generally, and also because the change will apply equally to all participants, the proposed fee under the tier remains consistent with pricing previously offered by the Exchange as well as competitors of the Exchange and does not represent a significant departure from the Exchange's general pricing structure.

The Exchange believes that its proposal to amend QIP Tier 3 and add a new QIP Tier 4 under footnote 5 is reasonable, fair and equitable and non-discriminatory, for the reasons set forth above with respect to volume-based pricing generally. In addition, the Exchange believes the reduction of the rebate offered under QIP Tier 3 is equitable and reasonable because of the adoption of QIP Tier 4, which will still provide Members with the ability to earn the current rebate provided by QIP Tier 3, albeit only if such Members satisfy the increased criteria. The Exchange also notes that although registration as a Market Maker is required to qualify for QIP, such registration is available to all Members on an equal basis. The Exchange also believes that proposed QIP Tier 4 is reasonable, fair and equitable, and non-discriminatory because it, like the QIP generally, is aimed to incentivize active market making on the Exchange.

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[15] The Exchange again notes that it currently applies a single rate for orders routed to and executed at the newest options exchange, ISE Mercury. As such, Customer orders execute at ISE Mercury technically pay the highest rate today, a fee of $0.99 per contract.

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(4).

With respect to the proposed routing structure, the Exchange again notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive. As explained above, the Exchange proposes to approximate the cost of routing to other options exchanges, including other applicable costs to the Exchange for routing, in order to provide a simplified and easy to understand pricing model. The Exchange believes that a pricing model based on approximate Routing Costs is a reasonable, fair and equitable approach to pricing. Specifically, the Exchange believes that its proposal to modify fees is fair, equitable and reasonable because the fees are generally an approximation of the cost to the Exchange for routing orders to such exchanges. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it will provide certainty with respect to execution fees at groups of away options exchanges. In order to achieve its flat fee structure, taking all costs to the Exchange into account, the Exchange will necessarily charge a higher premium to route to certain options exchanges than to others. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to such exchanges and to make some additional profit in exchange for the services it provides. The Exchange also believes that the proposed fee structure for orders routed to and executed at these away options exchanges is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members. Finally, the Exchange notes that it intends to consistently evaluate its routing fees, including profit and loss attributable to routing, as applicable, in connection with the operation of a flat fee routing service, and would consider future adjustments to the proposed pricing structure to the extent it was recouping a significant profit or loss from routing to away options exchanges.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed amendments to its fee schedule would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposal is a competitive proposal that is seeking to further the growth of the Exchange and to simplify the Exchange's fees for routing orders to away options exchanges. With respect to the tiered pricing changes, the Exchange has structured the proposed fees and rebates to attract additional volume to the Exchange based on pricing that is competitive with that offered by other options exchanges. In particular, by offering tiered pricing the Exchange is incentivizing Members to maintain and/or increase the liquidity provided to the Exchange, which is representative of the competitive nature of the options markets. With respect to the proposed routing fee structure, the Exchange believes that the proposed fees are competitive in that they will provide a simple approach to routing pricing that some Members may favor. Additionally, Members may opt to disfavor the Exchange's pricing, including pricing for transactions on the Exchange as well as routing fees, if they believe that alternatives offer them better value. In particular, with respect to routing services, such services are available to Members from other broker-dealers as well as other options exchanges. The Exchange also notes that Members may choose to mark their orders as ineligible for routing to avoid incurring routing fees.[18] Accordingly, the Exchange does not believe that the proposed change will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act[19] and paragraph (f) of Rule 19b–4 thereunder.[20] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BatsBZX–2016–14 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsBZX–2016–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE.,

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[18] *See* Exchange Rule 21.1(d)(7) (describing "Book Only" orders) and Exchange Rule 21.9(a)(1) (describing the Exchange's routing process, which requires orders to be designated as available for routing).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f).

Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsBZX–2016–14 and should be submitted on or before June 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–11293 Filed 5–12–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77785; File No. SR–CHX–2016–06]

Self Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Schedule of Fees and Assessments To Modify and Clarify Certain Fees Applicable to CHX Institutional Brokers

May 9, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b–4[2] thereunder, notice is hereby given that on May 3, 2016, the Chicago Stock Exchange, Inc. ("CHX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to amend its Schedule of Fees and Assessments (the "Fee Schedule") to modify and clarify certain fees applicable to CHX Institutional Brokers. The text of this proposed rule change is available on the Exchange's Web site at (*www.chx.com*) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

The Exchange proposes to amend the Fee Schedule to modify and clarify certain fees applicable to CHX Institutional Brokers ("Institutional Brokers").[3] Specifically, the Exchange proposes to amend Sections E.3(a) and E.7 of the Fee Schedule to modify and clarify the application of the respective fee caps.[4] The Exchange also proposes to amend Section E.4 of the Fee Schedule to correct a misstatement regarding its applicability.

Section E.3(a)

Currently, pursuant to Section E.3(a), the Exchange assesses a fee of $0.0030/share capped at $100 per side[5] for executions within the Matching System resulting from single-sided[6] or cross orders[7] for at least a Round Lot[8] submitted by Institutional Brokers as agent only ("Section E.3(a) executions"); except that a side that is represented by two or more Institutional Broker Representatives[9] ("IBR") is subject to separate fee caps per IBR.[10] Section E.3(a) fees are assessed to the Participant in whose name the execution is submitted for clearance and settlement. Section E.3(a) fees do not apply to executions resulting from orders submitted as Odd Lots, which are assessed fees pursuant to Section E.4.[11]

Identifying the side to a Section E.3(a) execution resulting from a single-sided order is simple because there will always be only one Trading Account associated with the single-sided order.[12] However, identifying the sides to a Section E.3(a) execution resulting from a cross order is usually more complex because such an execution is frequently allocated to three or more Trading Accounts, which may result in two or more clearing submissions. The following Example 1 illustrates how sides are currently allocated:

Example 1. Assume that a Section E.3(a) execution results from a cross order for 100,000 shares of XYZ priced at $10.00/share. Assume that the following Participants have been allocated the following positions:

- Trading Account A is allocated 40,000 shares on the buy side and 20,000 shares on the sell side.[13]
- Trading Account B is allocated 40,000 shares on the buy side.
- Trading Account C is allocated 20,000 shares on the buy side.
- Trading Accounts D and E are each allocated 20,000 shares on the sell side.
- Trading Account F is allocated 40,000 shares on the sell side.

Assume also that the execution results in the following five clearing submissions:

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[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* CHX Article 1, Rule 1(n) defining "Institutional Broker"; *see also generally* CHX Article 17.

[4] Section E.3(a) and E.7 fees are virtually identical as both apply to executions effected through Institutional Brokers that are cleared through the Exchange's clearing systems, except that Section E.3(a) applies to executions within the Matching System, whereas Section E.7 applies to qualified away executions pursuant to CHX Article 21, Rule 6(a).

[5] While the Fee Schedule does not provide an explicit definition for "side," the Exchange currently defines "side" as each Trading Account that is allocated a position per buy side and/or sell side of a Section E.3(a) execution. *See* CHX Article 1, Rule 1(ll) defining "Trading Account." A Participant may hold only one Trading Permit, but may create more than one Trading Account under a Trading Permit. *See* CHX Article 1, Rule 1(aa) defining "Trading Permit;" *see also* CHX Article 3, Rule 2(e).

[6] Single-sided orders include limit and market orders. *See* CHX Article 1, Rule 2(a)(1) defining "limit order"; *see also* CHX Article 1, Rule 2(a)(3) defining "market order."

[7] *See* CHX Article 1, Rule 2(a)(2) defining "cross order."

[8] *See* CHX Article 1, Rule 2(f)(3) defining "Round Lot."

[9] *See* CHX Article 1, Rule 1(gg) defining "Institutional Broker Representative."

[10] For example, a side may be represented by two or more Institutional Broker Representatives where a Clearing Participant represents two or more correspondent firms that are allocated positions to a single Section E.3(a) execution resulting from a cross order. In such case, two or more Institutional Broker Representatives will never represent a single correspondent firm.

[11] *See infra* note 16.

[12] All single-sided orders submitted to the Matching System originate from a single Trading Account and, upon execution, are locked-in and immediately reported to the relevant securities information processor and Qualified Clearing Agency. *See* CHX Article 1, Rule 1(ff) defining "Qualified Clearing Agency;" *see also supra* note 5.

[13] A Trading Account may be allocated positions on both sides of a Section E.3(a) execution where, for example, the Participant associated with the Trading Account is a Clearing Participant that represents two or more correspondent firms on both sides of the execution. *See* CHX Article 1, Rule 1(ee) defining "Clearing Participant."

Clearing submission	Buyers		Quantity	Sellers	
	Trading account	Subaccount[14]		Trading account	Subaccount
1	A	a	20,000	A	c
2	A	b	20,000	D	f
3	B	d	20,000	E	g
4	B	d	20,000	F	none
5	C	e	20,000	F	none

[14] Clearing Participants usually identify its correspondent firms via subaccounts, but do not always do so. As discussed below, the Exchange proposes to modify the Section E.3(a) fee allocation to consider subaccounts, so as to encourage the use of subaccount designations by Participants. Participants may create subaccounts under a Trading Account for no additional fee.

Pursuant to current Section E.3(a), Participants would be allocated fees as follows:

- Trading Account A would be attributed two sides, one on each side of the execution. Thus, the Participant associated with Trading Account A would be assessed a $100 fee on the buy side (*i.e.,* 40,000 shares x $0.0030/share = $120, capped at the $100 maximum fee) and a $60 fee on the sell side (*i.e.,* 20,000 shares x $0.0030/share = $60) for a total of $160.
- Trading Account B would be attributed one side. Thus, the Participant associated with Trading Account B would be assessed a $100 fee (*i.e.,* 40,000 shares x $0.0030/share = $120, capped at the $100 maximum fee).
- Trading Accounts C, D and E would be attributed one side each. Thus, each Participant associated with each Trading Account would be assessed a $60 fee (*i.e.,* 20,000 shares x $0.0030/share = $60).
- Trading Account F would be attributed one side. Thus, the Participant associated with Trading Account F would be assessed a $100 fee (*i.e.,* 40,000 shares x $0.0030/share = $120, capped at the $100 maximum fee).

As shown under Example 1, a single Trading Account would be assessed a single capped fee for each side of the Section E.3(a) execution, regardless of the number of subaccounts under the Trading Account allocated positions to the Section E.3(a) execution. The Exchange believes that the Section E.3(a) fee can be more equitably applied by applying the fee cap *per subaccount,* which would better ensure that, for example, Participants representing different correspondent firms[15] on the same side of a single Section E.3(a) execution would be assessed separate capped fees per correspondent firm, whereas Participants that do not represent different correspondent firms on the same side of a Section E.3(a) execution would continue to be assessed a single capped fee. Thus, the Exchange proposes to amend Section E.3 to effect this change.

Initially, the Exchange proposes to capitalize the term "executions" in the title of current Section E.3(a) to be consistent with the capitalized "Executions" in the title of current Section E.3(b).

Also, the Exchange proposes to replace the first full paragraph of current Section E.3 with proposed paragraphs (a)(1) and (a)(2), which largely restate and clarify the current provisions, while omitting certain outdated or inaccurate language, as described below. Specifically, proposed paragraph (a)(1) provides that amended Section E.3(a) shall apply to all executions within the Matching System resulting from single-sided or cross orders submitted as at least a Round Lot[16] by Institutional Brokers as agent only. Proposed paragraph (a)(2) provides that Section E.3(a) fees shall be charged to each Clearing Participant allocated position(s) to a Section E.3(a) execution; provided if a Section E.3(a) execution results from a single-sided order, the Institutional Broker will be charged the Section E.3(a) fee and attributed credits pursuant to Section E.1(b) and (c).[17]

Moreover, so as to implement a more intuitive and equitable application of the Section E.3(a) fee cap, the Exchange propose to adopt proposed paragraph (a)(3), which adopts the term "Clearing Side," which means the buy or sell side of an individual clearing submission that is related to a Section E.3(a) or Section E.7 execution;[18] provided all Clearing Sides of a given execution attributed to a single subaccount shall be aggregated per buy and sell sides separately and each aggregation subject to separate capped fee.[19]

Currently, a Trading Account may be represented on two or more clearing submissions on the same side of the Section E.3(a) execution if the portion of the execution allocated to that Trading Account is larger than allocations to two or more contra-side Trading Accounts.[20]

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[15] The term "correspondent firm" refers to the customer of a Clearing Participant utilizing the clearing services of the Clearing Participant.

[16] The first full paragraph under current Section E.3 provides, in pertinent part, that single-sided and cross orders submitted as Odd Lots that otherwise would be assessed fees pursuant to current Section E.3(a) are assessed fees pursuant to current Section E.4 ("Odd Lot fee"). However, current Section E.4 provides that the Odd Lot fee applies to single-sided orders only. Thus, the Exchange proposes to amend current Section E.4 to eliminate the word "single-sided" from the title and amend the first sentence of Section E.4 to provide that subject to Section E.9, these fees are charged to the Participant that submits an Odd Lot order to the Matching System, whether electronically by the Participant or through an Institutional Broker; provided that these fees shall not apply to executions resulting from cross orders subject to fees set forth under Sections E.2 (cross orders submitted by non-Institutional Brokers) and E.3(b) (cross orders submitted by Institutional Brokers where the Institutional Broker is acting as principal on one side and agent on the other). Section E.3(b) executions are not subject to the Odd Lot fee because Section E.3(b) explicitly provides that the Section E.3(b) fee applies to executions resulting from Odd Lots as well.

Thus, the Odd Lot fee only applies to executions resulting from -1- Odd Lot single-sided orders submitted by any Participant and -2- Odd Lot agency cross orders submitted by Institutional Brokers.

[17] The first full paragraph under current Section E.3 provides, in pertinent part, that if the Institutional Broker executes the Section E.3(a) order in the Matching System, the Institutional Broker (not its customer) will be assessed applicable Matching System fees pursuant to Sections E.1 and E.2. While the current language is generally correct, the second clause of proposed paragraph (a)(2) updates and clarifies its meaning. Specifically, the current language contemplates an outdated distinction between orders "executed within the Matching System" and orders executed by Institutional Brokers. Since all orders executed on the Exchange are always executed within the Matching System, the Exchange proposes to eliminate that distinction. *See* CHX Article 9, Rule 13(a). Also, while Section E.1(a) provides that Section E.3(a) orders are not subject to the Section E.1 liquidity removing fee, the Exchange believes that it is clearer to state that Section E.3(a) orders are subject to the Section E.3(a) fee and attributed credits pursuant to Section E.1(b) and (c), as opposed to stating that Section E.3(a) orders are subject to Section E.1 fees. Moreover, since Section E.2 fees only apply to cross orders submitted by non-Institutional Broker Participants, the Exchange proposes to eliminate the reference to Section E.2.

[18] *See supra* note 4; *see also infra* description of proposed amendments to Section E.7.

[19] Correspondingly, the Exchange proposes to replace references to "side" under the first sentence of the second columns of Sections E.3(a) and E.7 with "Clearing Side."

In light of the proposed definition of "Clearing Side," the Exchange also proposes to delete the last paragraph of current Section E.3 as obviated and redundant of amended Section E.3(a).

[20] *See* Trading Account A under Example 1.

Utilizing the concept of the Clearing Side, current Section E.3(a) would require that all Clearing Sides attributed to a single *Trading Account* be aggregated per buy and sell sides separately, with each aggregation subject to a single capped fee, unless two or more IBRs are associated with the Trading Account, in which case the Section E.3(a) fee cap would be applied per IBR. However, amended Section E.3(a) would require that all Clearing Sides attributed to a single *subaccount* under a Trading Account be aggregated per buy and sell sides separately, with each aggregation subject to a single capped fee. Since a subaccount attributed to a single correspondent firm could never be represented by two or more IBRs on the same Section E.3(a) or Section E.7 execution, the Exchange proposes to eliminate the current IBR consideration described under the last paragraph of current Section E.3, as the proposed subaccount aggregation provides sufficient granularity to obviate the IBR consideration.[21]

The following Example 2 illustrates the application of amended Section E.3(a):

Example 2. Assume the same as Example 1, except that fees are allocated pursuant to amended Section E.3(a). Pursuant to amended Section E.3(a), Participants would be allocated fees as follows:

- Trading Account A would be attributed three Clearing Sides, two on the buy side representing subaccounts a and b, respectively, and one on the sell side. Thus, the Participant associated with Trading Account A would be assessed a $120 fee on the buy side (*i.e.,* 20,000 shares × $0.0030/share = $60 for each subaccount) and a $60 fee on the sell side (*i.e.,* 20,000 shares × $0.0030/share = $60) for a total of $180.
- Trading Account B would be attributed two Clearing Sides. However, pursuant to proposed Section E.3(a)(3), all Clearing Sides attributed to a single subaccount would be aggregated for fee cap purposes. Thus, the Participant associated with Trading Account B would be assessed a $100 fee (*i.e.,* 40,000 shares × $0.0030/share = $120, capped at $100).
- Trading Accounts C, D and E would each continue to be attributed one Clearing Side. Thus, each Participant associated with each Trading Account would be assessed a $60 fee (*i.e.,* 20,000 shares × $0.0030/share = $60).
- Trading Account F would be attributed two Clearing Sides. However, because the Participant associated with Trading Account F did not designate any subaccounts, the Participant would be assessed $120 fee (*i.e.,* 20,000 × $0.0030 = $60 for each Clearing Side for a total of $120).[22]

Section E.7

Current Section E.7 provides a fee that is virtually identical to Section E.3(a), except that it applies to non-CHX executed trades for which clearing information is entered by an Institutional Broker into the Exchange's systems and submitted to a Qualified Clearing Agency pursuant to Article 21, Rule 6(a) ("Section E.7 execution"). Given that the application of the Section E.7 fee is virtually identical to the application of the Section E.3(a) fee, the Exchange proposes to adopt amendments under Section E.7 that are similar to the proposed amendments to Section E.3(a).

Specifically, the Exchange proposes to designate the first sentence of the last paragraph under current Section E.7 as proposed paragraph (a) and add language referring to the execution subject to the Section E.7 fee as "Section E.7 execution." The Exchange further proposes to delete the second sentence of the last paragraph under current Section E.7, which the Exchange believes is redundant of the Section E.7 fee cap, which is already stated previously under Section E.7 and obviated by the definition of Clearing Side, under proposed Section E.3(a)(3).

The Exchange also proposes to adopt proposed paragraph (b), which provides that Section E.7 fees shall be charged to each Clearing Participant allocated position(s) to a Section E.7 execution. Proposed paragraph (b) is virtually identical to proposed Section E.3(a)(2), except that proposed paragraph (b) omits reference to the billing of executions resulting from single-sided orders, as Section E.7 does not apply to single-sided orders submitted to the Matching System.

Operative Date

The proposed rule change is effective upon filing, but will be operative on June 1, 2016.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[23] in general, and furthers the objectives of Section 6(b)(4) of the Act[24] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using its facilities. Specifically, Sections E.3(a) and E.7 fees will continue to be equitably allocated among all Clearing Participants and Institutional Brokers. Moreover, the Exchange believes that the modified fee cap allocation method is reasonable as it attempts to apply the fee cap at a more granular level per beneficial party to the Section E.3(a) and Section E.7 transactions, which will more equitably allocate fees among Participants based on their activity on the Exchange.

Moreover, the Exchange believes that the proposed rule change is consistent with Section 6(b)(1) of the Act[25] in particular in that the proposed rule change clarifies the applicability of Section E.3(a) and E.4 fees, which would further enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Participants and persons associated with its Participants, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels set by the Exchange to be excessive. The Exchange believes that the proposed rule change modifies the application of the fee cap to be more equitable and intuitive. Thus, the Exchange believes that the proposed rule change will further encourage market participants to submit orders to the Exchange through Institutional Brokers, which will enhance competition in the national market system.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section

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[21] *See supra* note 19.

[22] If the Trading Account F Clearing Sides shared the same subaccount, the Participant would have been assessed a single capped fee of $100. *See supra* note 14.

[23] 15 U.S.C. 78f.

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78f(b)(1).

19(b)(3)(A)(ii) of the Act[26] and subparagraph(f)(2) of Rule 19b–4 thereunder[27] because it establishes or changes a due, fee or other charge imposed by the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CHX–2016–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2016–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2016–06 and should be submitted on or before June 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–11294 Filed 5–12–16; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14713 and #14714]

Louisiana Disaster #LA–00061

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of LOUISIANA dated 05/05/2016.

Incident: Severe Storms, Tornadoes and Straight-line Winds.

Incident Period: 02/23/2016 through 02/24/2016.

Effective Date: 05/05/2016.

Physical Loan Application Deadline Date: 07/05/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 02/06/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Parishes:

Assumption, Saint James, St John The Baptist.

Contiguous Parishes:

Louisiana: Ascension, Iberia, Iberville, Jefferson, Lafourche, Livingston, Saint Charles, Saint Martin, Saint Mary, Tangipahoa, Terrebonne.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.625
Homeowners Without Credit Available Elsewhere	1.813
Businesses With Credit Available Elsewhere	6.250
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.625
Non-Profit Organizations Without Credit Available Elsewhere	2.625
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.625

The number assigned to this disaster for physical damage is 14713 B and for economic injury is 14714 0.

The States which received an EIDL Declaration # are Louisiana.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Maria Contreras-Sweet,

Administrator.

[FR Doc. 2016–11384 Filed 5–12–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14717 and #14718]

Arkansas Disaster #AR–00076

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Arkansas (FEMA–4270–DR), dated 05/06/2016.

Incident: Severe Storms, Tornadoes, Straight-line Winds, and Flooding.

Incident Period: 03/08/2016 through 03/13/2016.

Effective Date: 05/06/2016.

Physical Loan Application Deadline Date: 07/05/2016.

Economic Injury (EIDL) Loan Application Deadline Date: 02/06/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business

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[26] 15 U.S.C. 78s(b)(3)(A)(ii).

[27] 17 CFR 240.19b–4(f)(2).

[28] 17 CFR 200.30–3(a)(12).

Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/06/2016, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Arkansas, Ashley, Bradley, Calhoun, Chicot, Cleveland, Columbia, Desha, Lincoln, Ouachita, Phillips, Prairie

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	2.625
Non-Profit Organizations Without Credit Available Elsewhere ...	2.625
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere ...	2.625

The number assigned to this disaster for physical damage is 14717B and for economic injury is 14718B.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–11386 Filed 5–12–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14667 and #14668]

Louisiana Disaster Number LA–00062

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 7.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–4263–DR), dated 03/13/2016.

Incident: Severe Storms and Flooding.

Incident Period: 03/08/2016 through 04/08/2016.

Effective Date: 05/05/2016.

Physical Loan Application Deadline Date: 06/13/2016.

EIDL Loan Application Deadline Date: 12/13/2016.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Louisiana, dated 03/13/2016 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 06/13/2016.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–11387 Filed 5–12–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 9560]

Plenary Meeting of the Binational Bridges and Border Crossings Group in Mexico City, Mexico, May 18, 2016

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Delegates from the United States and Mexican governments, the states of California, Arizona, Texas, and New Mexico, and the Mexican states of Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas, will participate in a Plenary Meeting of the U.S.-Mexico Binational Bridges and Border Crossings Group on Wednesday, May 18, 2016 in Mexico City, Mexico. The purpose of this meeting is to discuss operational matters involving existing and proposed international bridges and border crossings and their related infrastructure, and to exchange views on policy as well as technical information. This meeting will include a public session on Wednesday, May 18, 2016, from 8:45 a.m. until 11:30 a.m. This session will allow proponents of proposed bridges and border crossings and related projects to make presentations to the delegations and members of the public.

FOR FURTHER INFORMATION CONTACT: For further information on the meeting and to attend the public session, please contact the Mexico Desk's Border Affairs Unit, via email at *WHABorderAffairs@state.gov,* by phone at 202–647–9894, or by mail at Office of Mexican Affairs—Room 3924, Department of State, 2201 C St. NW., Washington, DC 20520.

Dated: May 6, 2016.

Rachel Poynter,

Acting Director, Office of Mexican Affairs, Department of State.

[FR Doc. 2016–11351 Filed 5–12–16; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF STATE

[Public Notice 9557]

Culturally Significant Objects Imported for Exhibition Determinations: "Unruly Nature: The Landscapes of Théodore Rousseau" Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257–1 of December 11, 2015), I hereby determine that the objects to be included in the exhibition "Unruly Nature: The Landscapes of Théodore Rousseau," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The J. Paul Getty Museum, Los Angeles, California, from on about June 21, 2016, until on or about September 11, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Dated: May 6, 2016.

Mark Taplin,

Deputy Assistant Secretary for Policy, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2016–11360 Filed 5–12–16; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 9558]

Culturally Significant Objects Imported for Exhibition Determinations: “Real/Ideal: Photography in France, 1847–1860” Exhibition

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257–1 of December 11, 2015), I hereby determine that the objects to be included in the exhibition “Real/Ideal: Photography in France, 1847–1860,” imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The J. Paul Getty Museum, Los Angeles, California, from on about August 30, 2016, until on or about November 27, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

Dated: May 6, 2016.

Mark Taplin,

Deputy Assistant Secretary for Policy, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2016–11353 Filed 5–12–16; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0122; Notice 2]

Van Hool N.V., Denial of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Denial of Petition.

SUMMARY: Van Hool N.V. (Van Hool), has determined that certain model year (MY) 2015–2016 Van Hool Double Deck buses do not fully comply with paragraph S5.3.4 of Federal Motor Vehicle Safety Standard (FMVSS) No. 121, *Air Brake Systems.* Van Hool filed a report dated November 6, 2015, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Van Hool then petitioned NHTSA under 49 CFR part 556 requesting a decision that the subject noncompliance is inconsequential to motor vehicle safety.

ADDRESSES: For further information on this decision contact James Jones, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5294, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. Overview

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Van Hool submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of Van Hool's petition was published, with a 30-day public comment period, on January 22, 2016 in the **Federal Register** (81 FR 3861). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management Systems (FDMS) Web site at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number “NHTSA–2015–0122.”

II. Vehicles Involved

Affected are approximately 48 MY 2015–2016 Van Hool Double Deck buses that were manufactured between December 13, 2014 and October 22, 2015.

III. Noncompliance

Van Hool explains that the noncompliance is that brake release times slightly exceed the requirements as specified in paragraph S5.3.4 of FMVSS No. 121.

IV. Rule Text

Paragraph S5.3.4 of FMVSS No. 121 requires in pertinent part:

> S5.3.4 *Brake Release Time.* Each service brake system shall meet the requirements of S5.3.1 (a) and (b).
>
> S5.3.4.1(a) With an initial service brake chamber air pressure of 95 psi, the air pressure in each brake chamber shall, when measured from the first movement of the service brake control, fall to 5 psi in not more than 0.55 second in the case of trucks and buses; 1.00 second in the case of trailers, other than trailer converter dollies, designed to tow another vehicle equipped with air brakes; 1.10 seconds in the case of trailer converter dollies; and 1.20 seconds in the case of trailers other than trailers designed to tow another vehicle equipped with air brakes. A vehicle designated to tow another vehicle equipped with air brakes shall meet the above release time requirement with a 50-cubic-inch test reservoir connected to the control line output coupling . . . .

V. Summary of Van Hool's Petition

Van Hool described the subject noncompliance and stated its belief that the noncompliance is inconsequential to motor vehicle safety based on the following reasoning:

(1) Based on the results of testing that Van Hool conducted on some of the affected buses, it determined that the brake release times, on average, exceeded the FMVSS No. 121 requirement by only 0.03 of a second on the front axle, by 0.05 of as second on the tag axle, and by 0.10 of a second on the drive axle.

(2) Van Hool determined that this noncompliance may be due to the change of fitting for this type of vehicle. These new fittings for the Double Deck buses were introduced in production in September 2014. The classic brass couplings were replaced with push-in tube connections made of composite material to remedy certain complaints of air loss. The effect of minimal loss of internal air flow was misjudged, which caused the brake release time to exceed the requirements.

However, Van Hool believes that there is no safety issue, nor unnecessary brake drag during acceleration after brake release due to the reaction time of the driver (moving foot from brake pedal to throttle pedal) and the reaction time of the complete driveline being longer than the brake release time.

(3) Van Hool stated its belief that because the brake actuation time on the

subject buses fulfilled the requirements as specified in paragraph S5.3.3 of FMVSS No. 121, that the noncompliance has no effect on the brake performance. Van Hool found that its testing showed a margin on the required brake actuation time of 11% for the front axle, 20% for the drive axle and 17% for the tag axle. For this reason Van Hool is convinced that the noncompliance will not show significant differences in dynamic brake test and will have no influence on the motor vehicle safety. Thus, Van Hool did not repeat the dynamic brake test. Also, the dynamic brake test was not repeated on any of the subject vehicles because Van Hool's dynamic brake test showed a minimum 25% margin for the brake stopping distance requirement.

(4) Van Hool made reference to previous inconsequential noncompliance petitions that it believes are similar to its petition and that were granted by NHTSA.

Van Hool additionally informed NHTSA that the noncompliance has been corrected on vehicles in subsequent production and that all future vehicles will be in full compliance with FMVSS No. 121.

In summation, Van Hool believes that the described noncompliances are inconsequential to motor vehicle safety, and that its petition, to exempt Van Hool from providing recall notification of noncompliances as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

NHTSA'S Decision

Background: FMVSS No. 121 establishes performance and equipment requirements for motor vehicles equipped with air brake systems. Paragraph S5.3.4.1(a) of FMVSS No. 121, requires in pertinent part that; with an initial service brake chamber air pressure of 95 psi, the air pressure in each brake chamber shall, when measured from the first movement of the service brake control, fall to 5 psi in not more than 0.55 second in the case of trucks and buses. To minimize brake drag after brake release, this requirement limits the time for pressurized air to exhaust from the service brake chamber after the brake pedal has been released.

Poor pneumatic timing could affect brake performance. For example, if a vehicle's wheels lock as the driver is attempting to stop, the vehicle will skid. If the driver is to regain control of the vehicle, immediate release of the brakes is necessary.[1] Additionally, poor pneumatic timing could cause the brakes to drag and cause premature wear of the brake linings. Under certain conditions, excessive brake drag could contribute to heat build-up within the foundation brake assembly resulting in degradation of braking power, particularly in cases in which the driver repeatedly applies the vehicle's brakes to reduce speed while traveling down an extended slope.

Van Hool produced buses that, on average, exceeded the FMVSS No. 121 requirement by 0.03s on the front axle, by 0.05s on the tag axle, and by 0.10s on the drive axle.

NHTSA's Analysis: Upon receipt and review of the petition, NHTSA sent a letter to Van Hool requesting test data, engineering analyses, simulations, etc. to support their claim that slower pneumatic release times do not adversely affect overall brake performance of subject noncompliant vehicles as a result of unnecessary brake drag after brake release [see Docket NHTSA–2015–0122].

In response, Van Hool provided data to demonstrate the performance of *compliant vehicles* when tested to the requirements of FMVSS No. 121 but failed to include any data or analyses to demonstrate the performance of *non-compliant vehicles* to those requirements.

Van Hool claimed that the noncompliance will not show significant differences in dynamic brake test [performance] and that dynamic testing on affected buses was not repeated for the following reasons:

(1) The *brake actuation time* on *affected buses* fulfilled the *brake actuation timing* requirements as specified in paragraph S5.3.3 of FMVSS No. 121 by a margin of 11% for the front axle, 20% for the drive axle and 17% for the tag axle;

(2) Dynamic brake tests on *compliant buses* showed a minimum 25% margin for the brake stopping distance requirement(s).

Van Hool also claimed that "testing according to FMVSS No. 121 wouldn't show a difference in heat build-up between a compliant and noncompliant bus."

Lastly, Van Hool stated that brake release timing has been the subject of previous petitions that it believes are similar to its petition and were granted by NHTSA. Thus, this petition should be granted.

NHTSA has concluded that Van Hool's claims are unsupported by any data or engineering analyses persuasive to grant the petition.

Certification test data Van Hool submitted in response to the letter indicated that brake release times for compliant buses were at the maximum limit of the safety standard's requirement of 0.55s in 3 of 5 tests of the front axles (*i.e.*, Axle 1) and 2 of 5 tests of the drive axles (*i.e.*, Axle 2) and tag axles (*i.e.*, Axle 3), respectively.[2] The low margin of safety reflected in these test results, which were conducted as early as 2008, should have indicated to Van Hool that a corrective action to improve the performance of the braking system to achieve a more desirable margin of safety may have been warranted.

In previous petitions concerning brake release timing, NHTSA emphasized that only the failure of the subject vehicles was at issue. NHTSA concluded that, "*the test data results and analyses were sufficient to grant the petition for the specific conditions that cause the subject vehicles to be out of compliance with the standard's pneumatic release time requirement.*"[emphasis added] (See 77 FR 20482). The same is true for this petition, NHTSA has considered the failure of the subject vehicles and whether the data and engineering analyses provided by Van Hool are sufficient to support its contention that the subject noncompliance in the subject vehicles is inconsequential to motor vehicle safety. In this case, Van Hool has failed to adequately support its contention.

NHTSA's Decision: In consideration of the foregoing, NHTSA finds that Van Hool has not met its burden of persuasion that the subject FMVSS No. 121 noncompliance is inconsequential to motor vehicle safety. Accordingly, NHTSA hereby denies Van Hool's petition and Van Hool is consequently obligated to provide notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Gregory K. Rea,

Associate Administrator for Enforcement.

[FR Doc. 2016–11271 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–59–P

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[1] 56 FR 13785

[2] In response to question (2) of NHTSA's letter, Van Hool submitted brake release timing test results from in-house testing conducted on five (5) compliant, Model TD925 double decker buses manufactured for sale in the United States from 2008 through 2012. Full certification test reports and a table of compiled brake timing test results were included in the submission [see page 4, Docket No. NHTSA–2015–0122].

DEPARTMENT OF TRANSPORTATION

[Docket No. PHMSA–2015–0205]

Pipeline Safety: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on proposed revisions to the following incident and accident report forms and associated instructions currently under OMB Control No. 2137–0522:

- PHMSA F 7100.1 Incident Report—Gas Distribution System.
- PHMSA F 7100.2 Incident Report—Natural and Other Gas Transmission and Gathering Pipeline Systems.
- PHMSA F 7100.3 Incident Report—Liquefied Natural Gas (LNG) Facilities.

PHMSA also intends to request a new Office of Management and Budget (OMB) Control Number to cover the collection of these forms.

PHMSA also proposes revisions be made to the following form currently under OMB Control No. 2137–0047; Accident Report—Hazardous Liquid Pipeline Systems.

DATES: Interested persons are invited to submit comments on or before July 12, 2016.

ADDRESSES: Comments may be submitted in the following ways:

E-Gov Web site: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the docket number, PHMSA–2015–0205 at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on: PHMSA–2015–0205." The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

FOR FURTHER INFORMATION CONTACT: Angela Dow by telephone at 202–366–1246, by email at *Angela.Dow@dot.gov,* by fax at 202–366–4566, or by mail at DOT, PHMSA, 1200 New Jersey Avenue SE., PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected entities an opportunity to comment on information collection and recordkeeping requests. This notice identifies proposed changes to information collections that PHMSA will submit to OMB for approval. In order to streamline and improve the data collection processes, PHMSA is revising the incident report forms for both hazardous liquid and natural gas operators.

OMB Control Number 2137–0047, which covers the collection of hazardous liquid incident data, expires on December 31, 2016. OMB Control Number 2137–0522, which currently covers the collection of both annual report and incident data for natural gas operators, expires on October 31, 2017. To simplify the renewal process of these data collections in the future, PHMSA proposes collecting incident and annual reports under separate OMB control numbers. To achieve this, PHMSA plans to request a new OMB control number for the three gas incident forms currently under OMB Control No. 2137–0522. The remaining reports under this information collection, the Gas Transmission, LNG, and Mechanical Fitting Failure annual reports will remain under their current OMB control number.

A. PHMSA F 7100.1 Incident Report—Gas Distribution System

PHMSA proposes to reorganize the existing questions and add more detailed questions about incident response, incident consequences, operating conditions, cause, and contributing factors.

1. Time Zone and Daylight Savings

PHMSA proposes adding the time zone and daylight savings status at the location and time of the incident. This data would help PHMSA correlate our incident investigation findings with the form.

2. Remove "Incident Resulted From" Question

PHMSA proposes removing the question which prompts operators to characterize an incident as an unintentional release, intentional release, or no release. The data we collect on the form is sufficient to answer this question. This change would reduce redundancies on the form.

3. Volume Released

PHMSA proposes dividing reports of volume released into categories of "unintentional" and "intentional". During incident response, operators often intentionally release gas from the pipeline system to reduce the pressure remaining within the pipeline. This change would allow stakeholders to understand the volume released both before and after the operator begins responding to the incident.

4. Part A Reorganization and Detailed Questions About Incident Response

PHMSA proposes reorganizing the existing questions to reflect the sequence of operator actions and events that take place during an incident response. For example, the manner in which an operator first learns of a pipeline failure is currently collected in Part E. PHMSA proposes to move this item to Part A. PHMSA also proposes to add new data fields to help build a complete timeline of events. This includes adding fields to collect data on operators' interactions with emergency responders and details about ignition. This data would help stakeholders develop a more thorough understanding of the incident.

5. Multiple National Response Center Reports

The vast majority of pipeline incidents have only one National Response Center (NRC) report. However, during a response to protracted incidents, pipeline operators may submit multiple reports to the NRC. In these rare instances, PHMSA proposes to collect each NRC report number. This change would help PHMSA ensure that our incident report data correlates with our incident investigation findings.

6. Flow Control Instead of Shutdown

PHMSA proposes removing questions about a pipeline shutdown and adding a question about methods of flow control. Gas distribution systems are typically the only source of gas to customers. Rather than shutting down gas distribution systems, pipeline operators typically control the flow of gas in the smallest possible portion of the system. This change would allow stakeholders to understand the actions taken by the operator to control the flow of gas during incident response.

7. Area of Incident Selections

PHMSA proposes adding "exposed due to loss of cover" as an option to describe the area of an incident when "underground" is selected. For pipelines installed underground and eventually exposed, the current form is not clear about whether "underground" or "above ground" should be selected. Adding "exposed due to loss of cover" as an underground option will clarify how to report the incident. This change would improve the consistency of reports.

8. Other Underground Facilities

PHMSA proposes adding a question to determine whether other underground facilities are found within twelve inches of the failure location. We know from experience that other underground facilities can damage pipeline systems. The most common cause of this damage is electrical arcing from electric facilities to gas systems. Generally, twelve inches of underground separation is considered adequate to prevent damage from non-pipeline facilities. This change would allow stakeholders to verify if twelve inches of separation is adequate.

9. Water Crossing Details

PHMSA proposes to collect additional data regarding water crossings. This data would help stakeholders understand the failure location along the crossing.

10. Part of System and Age of Failed Item

PHMSA proposes to modify the selections used to describe the part of the system responsible for a pipeline failure. These modifications would reduce the number of times "other" is selected and allow a more meaningful analysis of the data.

PHMSA also proposes collecting both the date of manufacture and the date of installation for the failed item. This would allow stakeholders to understand both the age of the failed item and how long it had been in service.

11. Service Line Excess Flow and Shut-Off Valves

PHMSA proposes adding questions about Excess Flow Valves (EFV) and shut-off valves when the failure occurs on the service line. Our regulations require EFVs in certain circumstances and shut-off valves on all service lines. The collection of this data would help PHMSA address the requirements in Section 22 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90) which requires EFVs on service lines serving a single-family residence. It would also help to implement the National Transportation Safety Board's (NTSB) recommendation P–01–2 which urges the installation of EFVs on branch services, multi-family facility services, and small commercial facility services. The proposed change would help stakeholders determine if EFV requirements are adequate and effective.

12. Cost of Gas

PHMSA proposes to collect the cost of gas per million standard cubic feet (mcf) in order to calculate the cost of gas released. Currently, the form collects the volume of gas released and the cost of the gas released. The cost per mcf in our current incident data ranges from cents to hundreds of dollars. By providing the gas cost per mcf, operators will achieve greater accuracy when converting the per mcf gas cost to released gas costs.

13. Details About Consequences

Our departmental guidelines for determining the benefit of proposed regulations (*http://www.transportation.gov/sites/dot.dev/files/docs/VSL%20Guidance%202013.pdf*) includes a table of relative values based on injury severity. Our forms currently collect the number of injured persons requiring in-patient, overnight hospitalization. We propose adding two less severe categories to the forms. This data would enable a more thorough determination of the benefits of proposed regulations.

We are proposing to collect the volume of product consumed by fire. We already collect data about the volume of product released and whether ignition occurred. However, we cannot identify the volume of product burned. This data would allow us to more accurately determine the social cost of carbon and benefit of proposed regulations.

We are proposing to collect the number of buildings affected by the incident. On the current forms, the property damage values do not include any details about the type of property damaged. This data would provide more details about the consequences of the incident and enable a more thorough determination of the benefit of proposed regulations.

We propose collecting data about the length of building evacuations. On the current form, we collect the number of persons evacuated from buildings. To implement DOT guidelines (*http://www.transportation.gov/office-policy/transportation-policy/guidance-value-time*) on the value of time, we need to know the length of the evacuation. This data would enable a more thorough determination of the benefit of proposed regulations.

14. Method and Date of Establishing Maximum Pressure

We propose adding the method used by the operator to establish the maximum pressure for the pipeline system. We also propose adding the date the maximum pressure was established. This data would help stakeholders determine the maximum pressure methods posing a greater risk and if the risk changes over time.

15. Odorization

We propose adding questions about the odorization of the gas. This change would help PHMSA correlate our incident investigation findings with the form.

16. External Corrosion and Stray Current

We propose collecting additional details when stray current is the cause of external corrosion. We have also clarified the conditions under which external corrosion cathodic protection is expected. This data would help stakeholders better understand the cause of external corrosion.

17. Natural Force Damage Additional Sub-Causes

We propose adding snow/ice and tree root damage as sub-causes in the natural force damage cause category. This addition would reduce the number of incidents reported with a cause of "other."

18. Excavation Details for All Excavation Damage

In the current form, when a third party causes the excavation damage, we collect details about the excavation work. We propose collecting details about the excavation work when the cause of the damage is first, second, or third party. When pipeline operator employees are excavating and damage their own pipeline, the damage is considered first party. When an excavator is working under contract for the pipeline operator and damages the operator's pipeline, they are considered a second party. First and second party excavation details would allow stakeholders to understand the type of excavation work being performed by any party causing the excavation damage.

19. State Damage Prevention Law Exemptions

We propose adding data about exemptions from state damage prevention laws when the cause of the incident is excavation damage. This data would help stakeholders determine states in which damage prevention law exemptions may be leading to more frequent excavation damage of pipelines.

20. Other Outside Force Damage Additional Sub-Cause

We propose adding "erosion of support due to other utilities" as a sub-cause in the other outside force damage cause category. This addition would reduce the number of incidents reported with a cause of "other."

21. Vehicular Damage Additional Details

We propose collecting details about driver performance and protection from damage when the cause is identified as "damage by car, truck, or other motorized vehicle/equipment not engaged in excavation." These questions will not include personally identifiable information or anything that violates the privacy of the driver. PHMSA will request information such as whether the driver violated state or local driving laws, whether they were in control of the vehicle at the time of the collision, and the estimated speed at time of collision. "Unknown" will be allowed for all driver performance questions.

Often times, the narrative section of these incident reports mentions reckless or intoxicated drivers. By adding questions about driver performance and protective barriers, stakeholders can discern incidents that could have been prevented by the operator and incidents where the driver's performance may have been a factor.

22. Overhaul Mechanical and Compression Fittings

We propose combining "mechanical fitting" and "compression fitting" sub-causes into a single sub-cause and collecting additional details. We are combining the sub-causes because compression fittings are a type of mechanical fitting. When a mechanical fitting fails and causes a hazardous leak, operators are required submit form PHMSA F 7100.1–2—MECHANICAL FITTING FAILURE REPORT FORM FOR CALENDAR YEAR 20___ FOR DISTRIBUTION OPERATORS. We modified the incident report to collect the same data collected for hazardous leaks on PHMSA F 7100.1–2. This change would ensure consistency between data for hazardous leaks and incidents when a joint formed by a mechanical fitting fails.

23. Valve Material

We propose adding a question for the valve material when a valve is the sub-cause. This change would allow stakeholders to assess the risk posed by various valve materials.

24. Contributing Factors

Pipeline operators currently select only one cause on the form. Factors contributing to, but not causing an incident are often relevant to preventing future incidents. We propose collecting data about contributing factors. The proposal is similar to a recommendation made by the NTSB in their January 2015 safety study report "Integrity Management of Gas Transmission Pipelines in High Consequence Areas" (*http://www.ntsb.gov/safety/safety-studies/Documents/SS1501.pdf*). The NTSB recommended revising the gas transmission incident form to collect multiple root causes. We are proposing to collect contributing factors in addition to the apparent cause on all four forms. This data would help stakeholders develop a more thorough understanding of the incident and ways to prevent future incidents.

B. PHMSA F 7100.2 Incident Report—Natural and Other Gas Transmission and Gathering Pipeline Systems

PHMSA proposes to reorganize existing questions and add more detailed questions about gas transmission pipeline incident response, incident consequences, operating conditions, cause, and contributing factors. Many of these changes are similar to those proposed for gas distribution pipelines in section A above.

1. Change Form Name

We propose shortening the name of the form to "Incident Report—Gas Transmission and Gathering Systems". This change would remove extraneous words from the form name.

2. Time Zone and Daylight Savings

We propose adding the time zone and daylight savings status at the location and time of the incident. This data would help PHMSA correlate our incident investigation findings with the form.

3. Remove "incident resulted from"

We propose removing the question characterizing the incident as unintentional release, intentional release, or no release. We collect adequate data on the form to answer this question. This change would eliminate a redundant question from the form.

4. Operational Status

We propose collecting the operational status of the pipeline system at the time the operator identified the failure. On the current form, there is an assumption that the pipeline was in service at the time the operator identified the failure, but this is often not true. This change would help stakeholders understand the status of the pipeline and clarify the shutdown data.

5. Part A Reorganization and Detailed Questions About Incident Response

We reorganized existing questions to display the sequence of operator actions and interactions as the incident proceeds. For example, how the operator first learned of the pipeline failure is currently collected in Part E. PHMSA proposes to move this item to Part A. New items being added to build a complete timeline include interactions with emergency responders and details about ignition. This data would help stakeholders develop a more thorough understanding of the incident.

6. Multiple NRC Reports

The vast majority of pipeline incidents have only one NRC report.

During response to protracted incidents, pipeline operators may submit multiple reports to the NRC. In these rare instances, we are proposing to collect each NRC report number. This change would help PHMSA correlate our incident investigation findings with the form.

7. Flow Control and Valve Closures

We propose adding questions about initial actions the operator took to control the flow of product to the failure location. When valves are used, we propose collecting the date and time of the valve closure. This change implements a GAO recommendation from GAO–13–168, "Pipeline Safety: Better Data and Guidance Needed to Improve Pipeline Operator Incident Response." This change would allow stakeholders to understand the actions taken by the operator to control the flow of gas during incident response and collect data about the elapsed time to valve closure.

8. Area of Incident Selections

We propose adding "exposed due to loss of cover" as a selection for the area of incident when underground is selected. For pipelines installed underground and eventually exposed, the current form is not clear about whether underground or above ground should be selected. Adding "exposed due to loss of cover" as an underground option clarifies how to report the incident. This change would improve the consistency of reports.

9. Other Underground Facilities

We propose adding a question for whether other underground facilities are found within 12 inches of the failure location. We know from experience that other underground facilities can damage pipeline systems. The most common cause is electrical arcing from electric facilities to gas systems. Generally, 12 inches of underground separation is considered adequate to prevent damage from non-pipeline facilities. This change would allow stakeholders to verify if 12 inches of separation is adequate.

10. Outer Continental Shelf Regions

We propose collecting the Outer Continental Shelf (OCS) region when an incident occurs on the OCS. This change would provide stakeholders with a more precise location of the incident.

11. Item Involved and Age of Failed Item

We propose modifying the selections for the item that failed. We also propose collecting data about plastic pipe, which is quite common in gas gathering systems. These modifications would reduce the number of times "other" is selected and allow a more meaningful analysis of the data.

We propose collecting both the date of manufacture and the date of installation for the failed item. This would allow stakeholders to understand both the age of the failed item and how long it had been in service.

12. Additional Integrity Management Consequences

We propose adding a description of the cause of fatality or injury outside of the Potential Impact Radius (PIR) and impacts to wildlife when ignition occurs. Harm to people outside of a PIR is an important safety issue, and the new question will collect a text description of the cause. The cause of fatality or injury outside the PIR could help stakeholders determine if the PIR concept is suitable for continued use. The value of burnt wildlife habitat is important in calculating the benefit of proposed regulations.

13. Cost of Gas

We propose collecting the cost of gas per mcf and calculating the cost of gas released. Currently, the form collects the volume of gas released and the cost of the gas released. The cost per mcf in our current incident data ranges from cents to hundreds of dollars. By providing the gas cost per mcf, operators will achieve greater accuracy when converting the per mcf gas cost to released gas costs.

14. Details About Consequences

Our departmental guidelines for determining the benefit of proposed regulations (*http://www.transportation.gov/sites/dot.dev/files/docs/VSL%20Guidance%202013.pdf*) includes a table of relative values based on injury severity. Our forms currently collect the number of injured persons requiring in-patient, overnight hospitalization. We propose adding two less severe categories to the forms. This data would enable a more thorough determination of the benefit of proposed regulations.

We are proposing to collect the volume of product consumed by fire. We already collect data about the volume of product released and whether ignition occurred. However, we cannot identify the volume of product burned. This data would allow us to more accurately determine the social cost of carbon and benefit of proposed regulations.

We are proposing to collect the number of buildings affected by the incident. On the current forms, the property damage values do not include any details about the type of property damaged. This data would provide more details about the consequences of the incident and enable a more thorough determination of the benefit of proposed regulations.

We propose collecting data about the length of building evacuations. On the current form, we collect the number of person evacuated from buildings. To implement DOT guidelines (*http://www.transportation.gov/office-policy/transportation-policy/guidance-value-time*) on the value of time, we need to know the length of the evacuation. This data would enable a more thorough determination of the benefit of proposed regulations.

15. Gas Flow Rate

We propose adding the gas flow rate at the point and time of the incident. This change would help stakeholders better understand the operating conditions at the time of the failure.

16. Date of Establishing Maximum Pressure and Flow Reversals

We propose adding the date the operator established the maximum pressure for the pipeline system. We also propose adding a question about flow reversals. This data would help stakeholders have a better understanding of the maximum pressure determination method and whether a flow reversal may have invalidated the maximum pressure.

17. Odorization

We propose adding a question about whether the gas was odorized. This change would help stakeholders understand if people near the failure location should have been able to smell the escaping gas.

18. Length of Segment Isolated

We propose modifying the question about the length of pipeline isolated during incident response. In the current form, an assumption is made that valve closures will always be used to initially control flow to the failure location. This change would clarify the length to be reported when valves are not used to initially control flow to the failure location.

19. Function Choice Change

If a gas transmission failure occurs on a pipeline within a storage field, the current instructions are to select "storage gathering" as the function. Since this question first appeared in

2010, both operators submitting reports and analysts using our data have assumed "storage gathering" is a type of gas gathering, not gas transmission. To ensure this data is used for reports and analysis on systems having a transmission function, not gathering reports and analysis, we propose renaming this function from "storage gathering" to "transmission in storage field." PHMSA also intends to apply this re-designation to the data collected in all reports submitted since 1/1/2010. This would facilitate the proper flow of data through to PHMSA's public displays and data downloads. This change would help improve the accuracy of both gathering and transmission reports and analysis since the data will better correspond to the function of the pipeline system.

20. External Corrosion and Stray Current

We propose collecting additional details when stray current is the cause of external corrosion. We have also clarified the conditions under which external corrosion cathodic protection is expected. This data would help stakeholders better understand the cause of external corrosion.

21. Natural Force Damage Additional Sub-Cause

We propose adding tree root damage as a sub-cause in the natural force damage cause category. This addition would reduce the number of incidents reported with a cause of "other."

22. Excavation Details for All Excavation Damage

In the current form, when a third party causes the excavation damage, we collect details about the excavation work. We propose collecting details about the excavation work when the cause of the damage is first, second, or third party. When pipeline operator employees are excavating and damage their own pipeline, the damage is considered first party. When an excavator is working under contract for the pipeline operator and damages the operator's pipeline, they are considered a second party. First and second party excavation details would allow stakeholders to understand the type of excavation work being performed by any party causing the excavation damage.

23. State Damage Prevention Law Exemptions

We propose adding data about exemptions from state damage prevention laws when the cause of the incident is excavation damage. This data would help stakeholders determine states in which damage prevention law exemptions may be leading to more frequent excavation damage of pipelines.

24. Vehicular Damage Additional Details

We propose collecting details about driver performance and protection from damage when the cause is identified as "damage by car, truck, or other motorized vehicle/equipment not engaged in excavation." These questions will not include personally identifiable information or anything that violates the privacy of the driver. PHMSA will request information such as whether the driver violated state or local driving laws, whether they were in control of the vehicle at the time of the collision, and the estimated speed at time of collision. "Unknown" will be allowed for all driver performance questions.

Often times, the narrative section of these incident reports mention reckless or intoxicated drivers. By adding questions about driver performance and protective barriers, stakeholders can discern incidents that could have been prevented by the operator and incidents where the driver's performance may have been a factor.

25. Material Failure Cause Changes

When material failure of pipe or weld causes the incident, a sub-cause must be chosen. Errors in the design of pipeline facilities cause some incidents, but design is not included in any sub-cause. We propose adding a design to the "Construction-, Installation-, or Fabrication-related" sub-cause. This change would reduce the number of reports with cause of "other."

We propose adding another environmental cracking option, "hard spot." This is another type of environmental cracking that should be available for selection. This change would reduce the number of reports with cause of "other."

We propose adding a question to collect the post-construction pressure test value. When the pipe or a weld fails, the value of the post-construction pressure test is important to determining if the cause of the failure might have been present since original construction. This change would provide additional data to diagnose the cause of the pipe or weld failure.

26. Additional Integrity Inspection Data

In the current form, the same set of integrity inspection questions appear in four different cause sections. Only one cause can be selected so three sets of these questions are redundant. We propose having the questions appear once. For each report submitted since January 1, 2010, PHMSA would modify the database to have the questions appear only once. This change would simplify the form by reducing the number of distinct data fields.

We propose collecting two sets of in-line inspection results. Under PHMSA regulations, operators are conducting a second round of integrity inspections. This change would provide a history of in-line inspections rather than just the most recent. The additional inspection data may provide insights about the effectiveness of the various types of in-line inspections.

We propose collecting the type of direct assessment when this inspection method has been implemented. The additional inspection data may provide insights about the effectiveness of the various types of direct assessments.

27. Contributing Factors

Pipeline operators currently select only one cause on the form. Factors contributing to, but not causing an incident are often relevant to preventing future incidents. We propose collecting data about contributing factors. The proposal is similar to a recommendation made by NTSB in their January 2015 safety study report. NTSB recommended revising the Gas Transmission/Gas Gathering Form to collect multiple root causes. We are proposing to collect contributing factors in addition to the apparent cause on all four forms. This data would help stakeholders develop a more thorough understanding of the incident and ways to prevent future incidents.

C. PHMSA F 7100.3 Incident Report—Liquefied Natural Gas (LNG) Facilities

PHMSA proposes to add more detailed questions about LNG incidents and their consequences.

1. Multiple NRC Reports

The vast majority of pipeline incidents have only one NRC report. During response to protracted incidents, pipeline operators may submit multiple reports to the NRC. In these rare instances, we are proposing to collect each NRC report number. This change would help PHMSA correlate our incident investigation findings with the form.

2. Details About Consequences

Our departmental guidelines for determining the benefit of proposed regulations (*http://www.transportation.gov/sites/dot.dev/files/docs/VSL%20Guidance%202013.pdf*) includes a table of relative values based on injury severity. Our forms currently collect the number of injured persons requiring in-patient, overnight hospitalization. We propose adding two less severe categories to the forms. This data would enable a more thorough determination of the benefit of proposed regulations.

We are proposing to collect the volume of product consumed by fire. We already collect data about the volume of product released and whether ignition occurred. However, we cannot identify the volume of product burned. This data would allow us to more accurately determine the social cost of carbon and benefit of proposed regulations.

We are proposing to collect the number of buildings affected by the incident. On the current forms, the property damage values do not include any details about the type of property damaged. This data would provide more details about the consequences of the incident and enable a more thorough determination of the benefit of proposed regulations.

We propose collecting data about the length of building evacuations. On the current form, we collect the number of persons evacuated from buildings. To implement DOT guidelines (*http://www.transportation.gov/office-policy/transportation-policy/guidance-value-time*) on the value of time, we need to know the length of the evacuation. This data would enable a more thorough determination of the benefit of proposed regulations.

3. Contributing Factors

Pipeline operators currently select only one cause on the form. Factors contributing to, but not causing an incident are often relevant to preventing future incidents. We propose collecting data about contributing factors. The proposal is similar to a recommendation made by NTSB in their January 2015 safety study report. The NTSB recommended revising the GT/GG Form to collect multiple root causes. We are proposing to collect contributing factors in addition to the apparent cause on all four forms. This data would help stakeholders develop a more thorough understanding of the incident and ways to prevent future incidents.

D. PHMSA F 7000–1 Accident Report—Hazardous Liquid Pipeline Systems

PHMSA proposes to reorganize existing questions and add more detailed questions about incident response, incident consequences, operating conditions, cause, and contributing factors.

1. Change Form Name

We propose changing the name of the form to "Accident Report—Hazardous Liquid and Carbon Dioxide Systems." This change more accurately describes the types of pipelines using the form.

2. Time Zone and Daylight Savings

We propose adding the time zone and daylight savings status at the location and time of the incident. This data would help PHMSA correlate our incident investigation findings with the form.

3. Operational Status

We propose collecting the operational status of the pipeline system at the time the operator identified the failure. On the current form, there is an assumption that the pipeline was in service at the time the operator identified the failure, but this is often not true. This change would help stakeholders understand the status of the pipeline and clarify the shutdown data.

4. Part A Reorganization and Detailed Questions About Incident Response

We reorganized existing questions to display the sequence of operator actions and interactions as the incident proceeds. For example, how the operator first learned of the pipeline failure is currently collected in Part E. PHMSA proposes to move this item to Part A. New items being added to build a complete timeline include interactions with emergency responders, spill response resources, and details about ignition. This data would help stakeholders develop a more thorough understanding of the incident.

5. Multiple NRC Reports

The vast majority of pipeline incidents have only one NRC report. During response to protracted incidents, pipeline operators may submit multiple reports to the NRC. In these rare instances, we are proposing to collect each NRC report number. This change would help PHMSA correlate our incident investigation findings with the form.

6. Flow Control and Valve Closures

We propose adding questions about initial actions the operator took to control the flow of product to the failure location. When valves are used, we propose collecting the date and time of the valve closure. This change implements a GAO recommendation from GAO–13–168 "Pipeline Safety: Better Data and Guidance needed to Improve Pipeline Operator Incident Response." This change would allow stakeholders to understand the actions taken by the operator to control the flow of gas during incident response and collect data about the elapsed time to valve closure.

7. Area of Incident Selections

We propose adding "exposed due to loss of cover" as a selection for the area of incident when underground is selected. For pipelines installed underground and eventually exposed, the current form is not clear about whether underground or above ground should be selected. Adding "exposed due to loss of cover" as an underground option clarifies how to report the incident. This change would improve the consistency of reports.

8. Water Crossing Evaluation

We propose adding a question to collect the date of the most recent evaluation of the water crossing. These evaluations can provide information critical to protecting the integrity of water crossings. This change would provide stakeholders with this critical information.

9. OCS Regions

We propose collecting the OCS region when an incident occurs on the OCS. This change would provide stakeholders with a more precise location of the incident.

10. Item Involved and Age of Failed Item

We propose modifying the selections for the item that failed. These modifications would reduce the number of times "other" is selected and allow a more meaningful analysis of the data.

We propose collecting both the date of manufacture and the date of installation for the failed item. This would allow stakeholders to understand both the age of the failed item and how long it had been in service.

11. Volume of Soil

We propose adding a question for the volume of contaminated soil. The amount of soil contaminated provides an indication of the spread of the liquid product.

12. Details About Consequences

Our departmental guidelines for determining the benefit of proposed regulations (*http://www.transportation.gov/sites/dot.dev/files/docs/VSL%20Guidance%202013.pdf*) includes a table of relative values based on injury severity. Our forms currently collect the number of injured persons requiring in-patient, overnight hospitalization. We propose adding two less-severe categories to the forms. This data would enable a more thorough determination of the benefit of proposed regulations.

We are proposing to collect the volume of product consumed by fire. We already collect data about the volume of product released and whether ignition occurred. However, we cannot identify the volume of product burned. This data would allow us to more accurately determine the social cost of carbon and benefit of proposed regulations.

We are proposing to collect the number of buildings affected by the incident. On the current forms, the property damage values do not include any details about the type of property damaged. This data would provide more details about the consequences of the incident and enable a more thorough determination of the benefit of proposed regulations.

We propose collecting data about the length of building evacuations. On the current form, we collect the number of persons evacuated from buildings. To implement DOT guidelines (*http://www.transportation.gov/office-policy/transportation-policy/guidance-value-time*) on the value of time, we need to know the length of the evacuation. This data would enable a more thorough determination of the benefit of proposed regulations.

13. Establishing Maximum Pressure and Flow Reversals

We propose adding the method used by the operator to establish the maximum pressure for the pipeline system. We also propose adding the date the maximum pressure was established. This data would help stakeholders determine the maximum pressure methods posing a greater risk and if the risk changes over time.

We also propose adding a question about flow reversals. This data would help stakeholders have a better understanding of whether a flow reversal may have invalidated the maximum pressure.

14. Length of Segment Isolated

We propose modifying the question about the length of pipeline isolated during incident response. In the current form, an assumption is made that valve closures will always be used to initially control flow to the failure location. This change would clarify the length to be reported when valves are not used to initially control flow to the failure location.

15. External Corrosion and Stray Current

We propose collecting additional details when stray current is the cause of external corrosion. We have also clarified the conditions under which external corrosion cathodic protection is expected. This data would help stakeholders better understand the cause of external corrosion.

16. Natural Force Damage Additional Sub-Cause

We propose adding tree root damage as a sub-cause in the natural force damage cause category. This addition would reduce the number of incidents reported with a cause of "other."

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18. State Damage Prevention Law Exemptions

We propose adding data about exemptions from state damage prevention laws when the cause of the incident is excavation damage. This data would help stakeholders determine states in which damage prevention law exemptions may be leading to more frequent excavation damage of pipelines.

19. Material Failure Cause Changes

When material failure of pipe or weld causes the incident, a sub-cause must be chosen. Errors in the design of pipeline facilities cause some incidents, but design is not included in any sub-cause. We propose adding a design to the "Construction-, Installation-, or Fabrication-related" sub-cause. This change would reduce the number of reports with cause of "other."

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22. Contributing Factors

Pipeline operators currently select only one cause on the form. Factors contributing to, but not causing an incident are often relevant to preventing future incidents. We propose collecting data about contributing factors. The proposal is similar to a recommendation made by NTSB in their January 2015 safety study report. The NTSB recommended revising the GT/GG Form to collect multiple root causes. We are proposing to collect contributing factors in addition to the apparent cause on all four forms. This data would help stakeholders develop a more thorough understanding of the incident and ways to prevent future incidents.

II. Summary of Impacted Collection

Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies several information collection requests that PHMSA will submit to OMB for renewal. PHMSA expects many of the new data elements are already known by the operator and no report requires the completion of all fields on the forms. PHMSA has estimated the burdens below by adding 20% to the previous burdens—12 hours instead of 10.

The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. PHMSA will request a three-year term of approval for each information collection activity. PHMSA requests comments on the following information collections:

1. Title: Incident Reporting for Gas and LNG.

OMB Control Number: PHMSA will request from OMB.

Current Expiration Date: N/A.

Type of Request: Approval of a new collection.

Abstract: PHMSA is proposing revision to the following incident report forms to improve the granularity of the data collected in several areas: Gas Distribution Incident Report (PHMSA F. 7100.1); Incident Report—Natural and Other Gas Transmission and Gathering Pipeline System (PHMSA F 7100.2); and Incident Report—Liquefied Natural Gas Facilities (PHMSA F 7100.3). PHMSA is also requesting a new OMB Control Number to collectively cover these forms.

Affected Public: Pipeline Operators.

Annual Reporting and Recordkeeping Burden:

Estimated number of responses: 301.

Estimated annual burden hours: 3,612.

Frequency of collection: On occasion.

2. Title: Transportation of Hazardous Liquids by Pipeline: Recordkeeping and Accident Reporting.

OMB Control Number: 2137–0047.

Current Expiration Date: 7/31/2015.

Type of Request: Revision.

Abstract: This information collection covers recordkeeping and accident reporting by hazardous liquid pipeline operators who are subject to 49 CFR part 195. PHMSA is proposing to revise the form PHMSA F7000–1 to improve the granularity of the data collected in several areas.

Affected Public: Hazardous liquid pipeline operators.

Annual Reporting and Recordkeeping Burden:

Annual Responses: 847.

Annual Burden Hours: 56,229.

Frequency of collection: On occasion.

Comments are invited on:

(a) The need for the renewal and revision of these collections of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued in Washington, DC, on May 9, 2016, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Acting Associate Administrator for Pipeline Safety.

[FR Doc. 2016–11304 Filed 5–12–16; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[Docket No. TTB–2016–0001]

Proposed Information Collections; Comment Request (No. 59)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB); Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before July 12, 2016.

ADDRESSES: As described below, you may send comments on the information collections listed in this document using the "Regulations.gov" online comment form for this document, or you may send written comments via U.S. mail or hand delivery. TTB no longer accepts public comments via email or fax.

- *http://www.regulations.gov:* Use the comment form for this document posted within Docket No. TTB–2016–0001 on "Regulations.gov," the Federal e-rulemaking portal, to submit comments via the Internet;
- *U.S. Mail:* Michael Hoover, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.
- *Hand Delivery/Courier in Lieu of Mail:* Michael Hoover, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 400, Washington, DC 20005.

Please submit separate comments for each specific information collection listed in this document. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment.

You may view copies of this document, the information collections listed in it and any associated instructions, and all comments received in response to this document within Docket No. TTB–2016–0001 at *http://www.regulations.gov.* A link to that docket is posted on the TTB Web site at *http://www.ttb.gov/forms/comment-on-form.shtml.* You may also obtain paper copies of this document, the information collections described in it and any associated instructions, and any comments received in response to this document by contacting Michael Hoover at the addresses or telephone number shown below.

FOR FURTHER INFORMATION CONTACT: Michael Hoover, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone 202–453–1039, ext. 135; or email *informationcollections@ttb.gov* (please *do not* submit comments on this notice to this email address).

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

For each information collection listed below, we invite comments on:

(a) Whether the information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility;

(b) the accuracy of the agency's estimate of the information collection's burden;

(c) ways to enhance the quality, utility, and clarity of the information collected;

(d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following information collections (forms, recordkeeping requirements, or questionnaires):

Title: Drawback on Wines Exported.

OMB Number: 1513–0016.

TTB Form Number: F 5120.24.

Abstract: The Internal Revenue Code (IRC) at 26 U.S.C. 5062(b), provides, in general, that exporters of taxpaid domestic wine may claim "drawback" of the Federal excise tax paid or determined on the exported wine. Exporters use TTB F 5120.24 to document the wine's exportation and to submit drawback claims for the exported wine. TTB uses the provided information to determine if the exported wine is eligible for drawback and to calculate the amount of drawback due. This information is necessary to protect the revenue.

Current Actions: TTB is submitting this collection as a revision. The information collection remains unchanged. However, TTB is increasing the estimated number of respondents and the resulting total annual burden hours associated with this information collection due to an increase in the number of wine exporters filing drawback claims on TTB F 5120.24.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Number of Respondents: 40.

Estimated Total Annual Burden Hours: 179.

Title: Specific and Continuing Transportation Bonds—Distilled Spirits or Wines Withdrawn for Transportation to Manufacturing Bonded Warehouse, Class Six.

OMB Number: 1513–0031.

TTB Form Numbers: F 5100.12 and F 5110.67.

Abstract: The IRC at 26 U.S.C. 5214(a)(6) and 5362(c)(4) authorizes the transfer without payment of tax of, respectively, distilled spirits and wine from a bonded premises to certain bonded warehouses. Under 19 U.S.C. 1311, bonds are required for such transfers to protect the revenue. In order to provide proprietors of manufacturing bonded warehouses with operational flexibility based on individual need, TTB allows the filing of either a specific bond to cover a single shipment, using TTB F 5100.12, or a continuing bond to cover multiple shipments, using TTB F 5110.67.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Number of Respondents: 10.

Estimated Total Annual Burden Hours: 10.

Title: Usual and Customary Business Records Relating to Tax-Free Alcohol, TTB REC 5150/3.

OMB Number: 1513–0059.

TTB Recordkeeping Number: REC 5130/3.

Abstract: Under the IRC at 26 U.S.C. 5214, distilled spirits may be withdrawn free of tax for nonbeverage purposes by educational organizations, hospitals, laboratories, and similar institutions. Pursuant to section 5214, TTB has set forth recordkeeping requirements in 27 CFR part 22 to maintain accountability of tax-free spirits in order to protect the revenue.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions; and State, Local, and Tribal Governments.

Estimated Number of Respondents: 5,268.

Estimated Total Annual Burden Hours: 1 (one).

Title: Letterhead Applications and Notices Relating to Denatured Spirits, TTB REC 5150/2.

OMB Number: 1513–0061.

TTB Recordkeeping Number: REC 5150/2.

Abstract: Under the IRC at 26 U.S.C. 5214, denatured spirits (alcohol to which denaturants have been added to render it unfit for beverage purposes) may be withdrawn from distilled spirits plants free of tax for nonbeverage industrial purposes in the manufacture of personal and household products. Since it is possible to recover potable alcohol from denatured spirits and articles made with denatured spirits, a comprehensive system of controlling denatured spirits and articles made with denatured spirits is imposed by the IRC at 26 U.S.C. 5271–5275. In order to protect the revenue and public safety, these IRC sections and their implementing regulations in 27 CFR part 20 require an application and permit to withdraw and use specially denatured spirits, and require formulas, recordkeeping, reporting, and other operational procedures.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits; Not-for-profit institutions; and State, Local, and Tribal Governments.

Estimated Number of Respondents: 3,778.

Estimated Total Annual Burden Hours: 1,890.

Title: Tobacco Products Importer or Manufacturer—Records of Large Cigars Wholesale Prices (TTB REC 5230/1).

OMB Number: 1513–0071.

TTB Recordkeeping Number: REC 5230/1.

Abstract: The Internal Revenue Code (IRC), at 26 U.S.C. 5701, imposes a Federal excise tax on large cigars based on a percentage of the price for which such cigars are sold by the manufacturer or importer. Pursuant to the authority provided by the IRC at 26 U.S.C. 5741 to require recordkeeping, TTB has prescribed by regulation that manufacturers and importers maintain a list of large cigar sale prices. This provides TTB a means of verifying that the correct amount of tax was determined and ultimately paid by the manufacturer or importer of large cigars.

Current Actions: TTB is submitting this collection as a revision. The information collection remains unchanged. However, TTB is decreasing the estimated number of respondents and the resulting total annual burden hours associated with this information collection due to a decrease in TTB's estimate of the number of tobacco product manufacturers and importers subject to this information collection requirement.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 280.

Estimated Total Annual Burden Hours: 653.

Title: Marks on Wine Containers (TTB REC 5120/3).

OMB Number: 1513–0092.

TTB Recordkeeping Number: REC 5120/3.

Abstract: Under the authority of the IRC at 26 U.S.C. 5357, 5368, 5388, and 5662, the TTB regulations require that proprietors of bonded wine cellars identify wine kept on bonded premises with certain marks or labels placed on containers, such as tanks, barrels, bins, pallets, and cases, and that proprietors label wine bottles and other consumer containers with certain information, such as brand name, type of wine, and alcohol content, prior to removal for consumption or sale. While the marking and labeling of wine containers by proprietors is a usual and customary business practice, the regulatory requirements to display these marks and labels protects the revenue. The marking and labeling covered under this information collection identifies the contents of wine containers and helps to ensure that once wine is removed from bond coverage the correct Federal excise tax will be collected.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Number of Respondents: 10,506.

Estimated Total Annual Burden Hours: 1 (one).

Title: Recordkeeping for Tobacco Products Removed in Bond from a Manufacturer's Premises for Experimental Purposes—27 CFR 40.232(e).

OMB Number: 1513–0110.

TTB Recordkeeping Number: None.

Abstract: The Internal Revenue Code at 26 U.S.C. 5704(e) provides that manufacturers of tobacco products may remove tobacco products for experimental purposes without payment of Federal excise tax, as prescribed by regulation. Under that authority, the TTB regulations at 27 CFR 40.232(e) require the keeping of certain records regarding the shipment, description, use, and disposition of tobacco products removed for experimental purposes outside of the factory. Although the keeping of such records is a usual and customary business practice for manufacturers of tobacco products, these records provide TTB information that it uses to identify the lawful experimental use and disposition of nontaxpaid tobacco products, and to detect and prevent their diversion into the market.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Number of Respondents: 235.

Estimated Total Annual Burden Hours: 1 (one).

Title: COLAs Online Access Request.

OMB Number: 1513–0111.

TTB Form Number: F 5013.2.

Abstract: Respondents use this form to apply for access to TTB's COLAs Online system, which allows alcohol beverage industry members to electronically apply for a Certificate of Label Approval or for an exemption from label approval. TTB uses the provided information to identify the company on whose behalf the applicant claims to act, to verify the scope of the applicant's authority to act, and to evaluate the applicant's qualifications for access to the COLAs Online system before TTB issues that person a password allowing access to this TTB information system. This is necessary to protect the COLAs Online system from unauthorized users and other threats.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated number of burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 1,366.

Estimated Total Annual Burden Hours: 410.

Title: Petition for the Establishment of an American Viticultural Area.

OMB Number: 1513–0127.

TTB Form Number: None.

Abstract: Under the FAA Act at 27 U.S.C. 205(e), TTB regulates the use of applications of origin on wine labels, including the use of American viticultural area (AVA) names. Based on petitions submitted by interested parties, TTB establishes new AVAs or modifies existing AVAs through the rulemaking process. The TTB regulations in 27 CFR part 9 specify the information that must be included in such petitions so that TTB is able to evaluate the petitioner's proposal and determine if it meets TTB's regulatory requirements for creating a new AVA or amending the name, boundary, or other terms of an existing AVA.

Current Actions: TTB is submitting this collection as a revision. The information collection remains unchanged. However, TTB is increasing the estimated number of respondents and the resulting total annual burden hours associated with this information collection due to an increase in the number of AVA petitions received annually by TTB.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 15.

Estimated Total Annual Burden Hours: 1,950.

Title: Alternate Method—Automated Commercial Environment (ACE) and Partner Government Agency Message Set for Imports Regulated by the Alcohol and Tobacco Tax and Trade Bureau.

OMB Number: 1513—NEW.

Abstract: TTB administers several provisions of the U.S. Code that relate to the importation of alcohol beverages, industrial spirits, tobacco products, processed tobacco, and cigarette papers and tubes. The International Trade Data System (ITDS) is an interagency program to establish a single electronic access point through which importers and exporters may submit the data required by Federal government agencies for importation and exportation. The Security and Accountability for Every Port Act (SAFE Port Act) (Pub. L. 109–347) of 2006 mandated participation in ITDS for all agencies that require documentation for clearing or licensing the importation and exportation of cargo.

The Automated Commercial Environment (ACE) provides a "single window" that allows importers and exporters to enter one set of data for each shipment of imported or exported goods. The TTB Partner Government Agency (PGA) Message Set defines the TTB-specific information that importers may submit electronically through ACE to meet TTB requirements.

With regard to imports, TTB intends to issue an alternate method to allow importers to submit the TTB PGA Message Set electronically, in lieu of submitting paper documents to U.S. Customs and Border Protection (CBP) at importation. This information collection covers the data that would be submitted electronically through ACE under that alternate method. Most of the information that the alternate method will require importers to submit through ACE is already required by TTB's regulations. However, there are some additional requirements. For example, importers who are required to have a TTB permit number will submit their TTB permit number when filing electronically in ACE. In general, importers of TTB-regulated commodities are required to obtain a permit from TTB, but they have not previously been required by regulation to file that number with CBP. The information collected under this information collection appears in the "ACE Filing Instructions for TTB-Regulated Commodities" available at *www.cbp.gov.*

Current Actions: We are submitting this new information collection for OMB approval.

Type of Review: Approval of a new collection.

Affected Public: Businesses and other for-profits.

Estimated Number of Respondents: 10,525.

Estimated Total Annual Burden Hours: 105,250.

Dated: May 9, 2016.

Angela Jeffries,

Assistant Director, Regulations and Rulings Division.

[FR Doc. 2016–11334 Filed 5–12–16; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 2063

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2063, U.S. Departing Alien Income Tax Statement.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: U.S. Departing Alien Income Tax Statement.

OMB Number: 1545–0138.

Form Number: 2063.

Abstract: Form 2063 is used by a departing resident alien against whom a termination assessment has not been made, or a departing nonresident alien who has no taxable income from United States sources, to certify that they have satisfied all U.S. income tax obligations. The data is used by the IRS to certify that departing aliens have complied with U.S. income tax laws.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Responses: 20,540.

Estimated Time per Response: 50 minutes.

Estimated Total Annual Burden Hours: 17,049.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–11362 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Dividend Equivalents From Sources Within the United States, Forms 1042, 1042–S, and 1042–T

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning dividend equivalents from sources within the United States, Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, Form 1042–S, Foreign Person's U.S. Source Income Subject to Withholding, and Form 1042–T, Annual Summary and Transmittal of Forms 1042–S.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Kerry Dennis, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: REG–120282–10 (Final)/ Dividend Equivalents from Sources within the United States, Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, Form 1042–S, Foreign Person's U.S. Source Income Subject to Withholding, and Form 1042–T, Annual Summary and Transmittal of Forms 1042–T.

OMB Number: 1545–0096.

Form Numbers: 1042, 1042–S, and 1042–T.

Abstract: The regulations pertain to section 871(m) regarding dividend equivalent payments that are treated as U.S. source income. These regulations provide guidance regarding when payments made pursuant to certain financial instruments will be treated as U.S.-source income and subject to U.S. withholding tax. The information provided is necessary to permit withholding agents to determine whether U.S. withholding tax is due with respect to a payment of a dividend equivalent and the amount of the tax. The information will also be used for audit and examination purposes. Form 1042 is used by withholding agents to report tax withheld at source on payment of certain income paid to nonresident alien individuals, foreign partnerships, or foreign corporations. The IRS uses this information to verify that the correct amount of tax has been withheld and paid to the United States. Form 1042–S is used to report certain income and tax withheld information to nonresident alien payees and beneficial owners. Form 1042–T is used by withholding agents to transmit Forms 1042–S to the IRS.

Current Actions: There are no changes to the burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for profit organizations and individuals or households.

The burden estimate is as follows:

	Number of responses	Time per response	Total hours
Form 1042	36,400	18.05	657,020
Form 1042–S	3,525,300	.58	2,044,674
Form 1042–T	19,500	.20	3,900
REG–120282–10	30,000	8.00	240,000
	3,611,200	....	2,945,594

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Tuawana Pinkston,

IRS, Reports Clearance Officer.

[FR Doc. 2016–11367 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning debt

instruments with original issue discount; contingent payments; anti-abuse rule.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Kerry Dennis, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Debt Instruments With Original Issue Discount; Contingent Payments; Anti-Abuse Rule.

OMB Number: 1545–1450.

Regulation Project Number: TD 8674.

Abstract: This regulation relates to the tax treatment of debt instruments that provide for one or more contingent payments. The regulation also treats a debt instrument and a related hedge as an integrated transaction. The regulation provides general rules, definitions, and reporting and recordkeeping requirements for contingent payment debt instruments and for integrated debt instruments.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and state, local, or tribal governments.

Estimated Number of Respondents: 180,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 89,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 2, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–11364 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning definition of private activity bonds.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Definition of Private Activity Bonds.

OMB Number: 1545–1451.

Regulation Project Number: TD 8712.

Abstract: Internal Revenue Code section 103 provides generally that interest on certain State or local bonds is excluded from gross income. However, under Code sections 103(b)(1) and 141, interest on private activity bonds (other than qualified bonds) is not excluded. This regulation provides rules, for purposes of Code section 141, to determine how bond proceeds are measured and used and how debt service for those bonds is paid or secured.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 10,100.

Estimated Time per Respondent: 2 hours, 50 minutes.

Estimated Total Annual Burden Hours: 30,100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–11366 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2009–83

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2009–83, Credit for Carbon Dioxide Sequestration under Section 45Q.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Credit for Carbon Dioxide Sequestration under Section 45Q.

OMB Number: 1545–2153.

Notice Number: Notice 2009–83.

Abstract: The notice sets forth interim guidance, pending the issuance of regulations, relating to the credit for carbon dioxide sequestration (CO_2 sequestration credit) under § 45Q of the Internal Revenue Code.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a previously approved collection.

Affected Public: Business and for-profit.

Estimated Number of Respondents: 30.

Estimated Average Time per Respondent: 6 hrs.

Estimated Total Annual Burden Hours: 180 hrs.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–11369 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 5434 and 5434–A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5434, Application for Enrollment, and Form 5434–A, Application for Renewal of Enrollment.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 5434, Application for Enrollment, and Form 5434–A, Application for Renewal of Enrollment.

OMB Number: 1545–0951.

Form Number: 5434 and 5434–A.

Abstract: Form 5434 is used to apply for enrollment to perform actuarial services under the Employee Retirement income Security Act of 1974 (ERISA). Form 5434–A is used to renew enrollment every three years to perform actuarial services under (ERISA). The information is used by the Joint Board for the Enrollment of Actuaries to determine the eligibility of the applicant to perform actuarial services.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and households.

Estimated Number of Respondents: 6,000.

Estimated Time per Respondent: 38 minutes.

Estimated Total Annual Burden Hours: 38,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–11332 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning special rules under section 417(a)(7) for written explanation provided by qualified retirement plan after annuity starting dates.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Special Rules Under Section 417(a)(7) for Written Explanation Provided by Qualified Retirement Plan After Annuity Starting Dates.

OMB Number: 1545–1724.

Regulation Project Number: REG–109481–99.

Abstract: The collection of information requirement in section 1.417(e)–1(b)(3)(iv)(B) and 1.417(e)–1(b)(3)(v)(A) is required to ensure that a participant and the participant's spouse consent to a form of distribution from a qualified plan that may result in reduced periodic payments.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 50,000.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 12,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 5, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–11328 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning related group election with respect to qualified investments in foreign base company shipping operations.

DATES: Written comments should be received on or before July 12, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Kerry Dennis at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Related Group Election With Respect to Qualified Investments in Foreign Base Company Shipping Operations.

OMB Number: 1545–0755.

Regulation Project Number: TD 7959.

Abstract: This regulation concerns the election made by a related group of controlled foreign corporations to determine foreign base company shipping income and qualified investments in foreign base company shipping operations on a related group basis. The information required is necessary to assure that the U.S. shareholder correctly reports any shipping income of its controlled foreign corporations which is taxable to the shareholder.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 2 hours, 3 minutes.

Estimated Total Annual Burden Hours: 205.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 2, 2016.

Tuawana Pinkston,

IRS Supervisory Tax Analyst.

[FR Doc. 2016–11327 Filed 5–12–16; 8:45 am]

BILLING CODE 4830–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Friday,
No. 93 May 13, 2016

Part II

Securities and Exchange Commission

17 CFR Part 240

Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–77617; File No. S7–25–11]

RIN 3235–AL10

Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In accordance with Section 764 of Title VII (“Title VII”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the Securities and Exchange Commission (“SEC” or “Commission”) is adopting new rules under the Securities Exchange Act of 1934 (“Exchange Act”) that are intended to implement provisions of Title VII relating to business conduct standards and the designation of a chief compliance officer for security-based swap dealers and major security-based swap participants. The final rules also address the cross-border application of the rules and the availability of substituted compliance.

DATES: *Effective Date:* July 12, 2016.

Compliance Date: The compliance dates are discussed in Section IV.B of this release.

FOR FURTHER INFORMATION CONTACT: Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Joanne Rutkowski, Senior Special Counsel, Cindy Oh, Special Counsel, Lindsay Kidwell, Special Counsel, Stacy Puente, Special Counsel, Devin Ryan, Special Counsel, Office of Chief Counsel, Division of Trading and Markets, at (202) 551–5550, at the Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549. For further information on cross-border application of the rules, contact: Carol McGee, Assistant Director, Richard Gabbert, Senior Special Counsel, Joshua Kans, Senior Special Counsel, and Margaret Rubin, Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551–5550, at the Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

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I. Introduction

The Commission is adopting Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 to implement the business conduct standards and chief compliance officer (“CCO”) requirements for security-based swap dealers (“SBS Dealers”) and major security-based swap participants (“Major SBS Participants” and, together with SBS

Dealers, "SBS Entities") as set forth in Title VII of the Dodd-Frank Act.[1] The Commission is also amending Rules 3a67–10 and 3a71–3 and adopting Rule 3a71–6 with respect to the cross-border application of the rules and the availability of substituted compliance.

The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[2] The 2008 financial crisis highlighted significant issues in the over-the-counter derivatives markets, which experienced dramatic growth in the years leading up to the financial crisis and are capable of affecting significant sectors of the U.S. economy. Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for swaps and security-based swaps by, among other things: (1) Providing for the registration and comprehensive regulation of SBS Entities, swap dealers ("Swap Dealers"), and major swap participants ("Major Swap Participants" and, together with Swap Dealers, "Swap Entities"); (2) imposing clearing and trade execution requirements for swaps and security-based swaps, subject to certain exceptions; (3) creating recordkeeping, regulatory reporting, and public dissemination requirements for swaps and security-based swaps; and (4) enhancing the rulemaking and enforcement authorities of the Commission and the Commodity Futures Trading Commission ("CFTC").

The Commission initially proposed Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 in June 2011.[3] In May 2013, the Commission re-opened the comment period for all of its outstanding Title VII rulemakings, including the external business conduct rulemaking.[4]

The Commission received 40 comments on the Proposing Release, of which 9 were comments submitted in response to the Reopening Release.[5] Of the comments directed at the Cross-Border Proposing Release,[6] five referenced the proposed external business conduct standards specifically,[7] while others addressed cross-border issues generally, such as the application of substituted compliance,[8] without specifically referring to the Proposing Release. Of the comments submitted in response to the U.S. Activity Proposing Release,[9] eight addressed the proposed cross-border application of the business conduct standards.[10]

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* Public Law 111–203, Preamble.

[3] *See* Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 64766 (Jun. 29, 2011), 76 FR 42396 (Jul. 18, 2011) ("Proposing Release").

[4] *See* Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 69491 (May 1, 2013), 78 FR 30800 (May 23, 2013) ("Reopening Release").

[5] *See* letters from Kenneth M. Fisher, Senior Vice President and Chief Financial Officer, Noble Energy, dated July 7, 2011 ("Noble"); Chris Barnard, dated Aug. 10, 2011 ("Barnard"); R. Glenn Hubbard, Co-Chair, Committee on Capital Markets Regulation, John L. Thornton, Co-Chair, Committee on Capital Markets Regulation, and Hal S. Scott, Director, Committee on Capital Markets Regulation, dated Aug. 26, 2011 ("CCMR"); John F. Damgard, President, Futures Industry Association, Robert Pickel, Executive Chairman, International Swaps and Derivatives Association, Inc., and Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association, dated Aug. 26, 2011 ("FIA/ISDA/SIFMA"); Gerald W. McEntee, President, American Federation of State, County and Municipal Employees, dated Aug. 29, 2011 ("AFSCME"); Mark Hepsworth, President, Institutional Business, Interactive Data Corporation, dated Aug. 29, 2011 ("IDC"); Sen. Carl Levin, U.S. Senate, dated Aug. 29, 2011 ("Levin"); Susan N. Kelly, Senior Vice President of Policy Analysis and General Counsel, American Public Power Association, and Noreen Roche-Carter, Chair, Tax and Finance Task Force, Large Public Power Council, dated Aug. 29, 2011 ("APPA"); Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association, dated Aug. 29, 2011 ("MFA"); Dennis M. Kelleher, President & CEO, and Stephen W. Hall, Securities Specialist, Better Markets, Inc., dated Aug. 29, 2011 ("Better Markets (August 2011)"); Christopher A. Klem and Molly Moore, Ropes & Gray LLP, dated Aug. 29, 2011 ("Ropes & Gray"); Joanne T. Medero, BlackRock, Inc., dated Aug. 29, 2011 ("BlackRock"); Joseph Dear, Chief Investment Officer, California Public Employees' Retirement System, Jennifer Paquette, Chief Investment Officer, Colorado PERA, Keith Bozarth, Executive Director, State of Wisconsin Investment Board, Brian Guthrie, Executive Director, Teacher Retirement System of Texas, and Rick Dahl, Chief Investment Officer, Missouri State Employees' Retirement System, dated Aug. 29, 2011 ("CalPERS (August 2011)"); Barbara Roper, Director of Investor Protection, Consumer Federation of America, Marcus Stanley, Policy Director, Americans for Financial Reform, and Michael Greenberger, Law School Professor and Founder & Director, University of Maryland Center for Health & Homeland Security, dated Aug. 29, 2011 ("CFA"); American Benefits Council, dated Aug. 29, 2011 ("ABC"); Jeff Gooch, Chief Executive Officer, MarkitSERV, dated Aug. 29, 2011 ("MarkitSERV"); Timothy W. Cameron, Esq. Managing Director, Asset Management Group, Securities Industry and Financial Markets Association, dated Aug. 29, 2011 ("SIFMA (August 2011)"); John D. Walda, President and Chief Executive Officer, National Association of College and University Business Officers, dated Aug. 29, 2011 ("NACUBO"); Kevin Gould, President, Markit North America, Inc., dated Aug. 29, 2011 ("Markit"); Daniel F. C. Crowley, Partner, K&L Gates LLP, on behalf of the Church Alliance, dated Aug. 29, 2011 ("Church Alliance (August 2011)"); Christopher J. Ailman, California State Teachers' Retirement System, dated Aug. 30, 2011 ("CalSTRS"); John M. McNally, National Association of Bond Lawyers, dated Sept. 1, 2011 ("NABL"); Colette J. Irwin-Knott, National Association of Independent Public Finance Advisors, dated Sept. 6, 2011 ("NAIPFA"); ABA Securities Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association, dated Sept. 8, 2011 ("ABA Securities Association"); Kent A. Mason, Davis & Harman LLP, dated Sept. 15, 2011 ("Mason"); Senator Tim Johnson, Chairman, U.S. Senate Committee on Banking, Housing, and Urban Affairs, and Representative Barney Frank, U.S. House Committee on Financial Services, dated Oct. 4, 2011 ("Johnson"); Lawrence B. Patent, K&L Gates LLP, on behalf of the Church Alliance, dated Oct. 4, 2011 ("Church Alliance (October 2011)"); Joseph Dear, Chief Investment Officer, California Public Employees' Retirement System et al., dated Oct. 4, 2011 ("CalPERS (October 2011)"); Susan Gaffney Director, Federal Liaison Center, Government Finance Officers Association, dated Oct. 31, 2011 ("GFOA"); Jeffery W. Rubin, Chair, Federal Regulation of Securities Committee, American Bar Association Business Law Section and Nir D. Yarden, Chair, Institutional Investors Committee, American Bar Association, dated Dec. 7, 2011 ("ABA Committees"); Bruce E. Stern, Chairman, Association of Financial Guaranty Insurers, dated Sept. 17, 2012 ("AFGI (September 2012)"); Financial Services Roundtable, Future Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association, dated May 21, 2013 ("Financial Services Roundtable"); Bruce E. Stern, Chairman, Association of Financial Guaranty Insurers, dated July 22, 2013 ("AFGI (July 2013)"); Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc., dated July 22, 2013 ("ISDA (July 2013)"); Dennis M. Kelleher, President and CEO, and Stephen W. Hall, Securities Specialist, Better Markets, Inc., dated July 22, 2013 ("Better Markets (July 2013)"); Dennis M. Kelleher, President and CEO, Better Markets, Inc., dated Oct. 18, 2013 ("Better Markets (October 2013)"); Angie Karna, Managing Director, Legal, Nomura Global Financial Products Inc., dated Sept. 10, 2014 ("Nomura"); Kyle Brandon, Managing Director, Securities Industry and Financial Markets Association, dated Aug. 7, 2015 ("SIFMA (August 2015)"); Kyle Brandon, Managing Director, Securities Industry and Financial Markets Association, dated Sept. 23, 2015 ("SIFMA (September 2015)"); Kyle Brandon, Managing Director, Securities Industry and Financial Markets Association, dated Nov. 3, 2015 ("SIFMA (November 2015)"). The comments that the Commission received on the Proposing Release and the Reopening Release are available on the Commission's Web site at *http://www.sec.gov/comments/s7-25-11/s72511.shtml.*

[6] Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) ("Cross-Border Proposing Release").

[7] *See* letters from Robert Pickel, International Swaps and Derivatives Association, Inc., dated Aug. 14, 2013 ("ISDA (August 2013)"); Karrie McMillan, General Counsel, Investment Company Institute and Dan Waters, Managing Director, ICI Global, dated Aug. 21, 2013 ("ICI"); Dennis M. Kelleher, President & CEO, Better Markets, Inc., Stephen W. Hall, Securities Specialist, Better Markets, Inc., and Katelynn O. Bradley, Attorney, Better Markets, Inc., dated Aug. 21, 2013 ("Better Markets (August 2013)"); Kenneth E. Bentsen, Jr., President, Securities Industry and Financial Markets Association, Walt Lukken, President & Chief Executive Officer, Futures Industry Association; and Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, dated Aug. 21, 2013 ("SIFMA (August 2013)"); Matti Leppälä, Secretary General/CEO, PensionsEurope, dated Sep. 3, 2013 ("PensionsEurope"). These comment letters are available on the Commission's Web site at *https://www.sec.gov/comments/s7-02-13/s70213.shtml.*

The Commission is now adopting Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1, with certain revisions suggested by commenters or designed to clarify the rules and conform them to the rules adopted by the CFTC. The principal aspects of the rules are briefly described immediately below. A detailed discussion of each rule follows in Sections II.A.–II.J, below.[11]

A. Summary of Final Rules

Rule 15Fh–1, as adopted, defines the scope of Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1, and provides that an SBS Entity can rely on the written representations of a counterparty or its representative to satisfy its due diligence requirements under the rules, unless it has information that would cause a reasonable person to question the accuracy of the representation.

Rule 15Fh–2, as adopted, sets forth the definitions used throughout Rules 15Fh–1 through 15Fh–6. The defined terms are discussed in connection with the rules in which they appear.

Rule 15Fh–3, as adopted, defines the business conduct requirements generally applicable to SBS Entities with respect to: (1) Verification of counterparty status as an eligible contract participant ("ECP") or special entity; (2) disclosure to the counterparty of material information about the security-based swap, including material risks, characteristics, incentives, and conflicts of interest; (3) disclosure of information concerning the daily mark of the security-based swap; (4) disclosure regarding the ability of the counterparty to require clearing of the security-based swap; (5) communication with counterparties in a fair and balanced manner based on principles of fair dealing and good faith; and (6) the establishment of a supervisory and compliance infrastructure. Rule 15Fh–3, as adopted, additionally requires an SBS Dealer to: (1) Establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each known counterparty that are necessary to conduct business with that counterparty; and (2) comply with certain suitability obligations when recommending a security-based swap, or trading strategy involving a security-based swap, to a counterparty.

Rule 15Fh–4(a), as adopted, provides that it shall be unlawful for an SBS Entity to: (i) Employ any device, scheme, or artifice to defraud any special entity or prospective customer who is a special entity; (ii) engage in any transaction, practice, or course of business that operates as a fraud or deceit on any special entity or prospective customer who is a special entity; or (iii) to engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

Rule 15Fh–4(b), as adopted, sets forth particular requirements for SBS Dealers acting as advisors to special entities.[12] Specifically, an SBS Dealer that acts as an advisor to a special entity must act in the "best interests" of the special entity, and make reasonable efforts to obtain information that it needs to determine that the recommendation is in the "best interests" of the special entity.[13]

Rule 15Fh–5, as adopted, sets forth particular requirements for SBS Entities acting as counterparties to special entities. Under the rule, those SBS Entities must have a reasonable basis to believe that the counterparty has a qualified representative who: (1) Has sufficient knowledge to evaluate the transaction and risks; (2) is not subject to a statutory disqualification; (3) is independent of the SBS Entity; (4) undertakes a duty to act in the best interests of the special entity; (5) makes appropriate and timely disclosures to the special entity of material information concerning the security-based swap; and (6) provides written representations regarding fair pricing and the appropriateness of the security-based swap. If the special entity is an employee benefit plan that is subject to regulation under Title I of ERISA ("ERISA plan"), these requirements are satisfied if the independent representative is a "fiduciary" under ERISA. In addition, the independent representative must be subject to pay-to-play regulation if the special entity is a "municipal entity" or a "governmental plan" as defined in Section 3 of ERISA.

Rule 15Fh–6, as adopted, imposes certain pay-to-play restrictions on SBS Dealers. The rule generally prohibits an SBS Dealer from engaging in security-based swap transactions with a "municipal entity" within two years after certain political contributions have been made to officials of the municipal entity. As with other pay-to-play rules, Rule 15Fh–6 does not prohibit political contributions.

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[8] *See* letters from Stephen Maijoor, Chair, European Securities and Markets Authority, dated Aug. 21, 2013 ("ESMA"); Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association and Adam Jacobs, Director, Head of Markets Regulation, Alternative Investment Management Association, dated Aug. 19, 2013 ("MFA/AIMA"); Marcus Stanley, Policy Director, Americans for Financial Reform, dated Aug. 22, 2013 ("AFR"); Sarah A. Miller, Chief Executive Officer, Institute of International Bankers, dated Aug. 21, 2013 ("IIB (August 2013)"); Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, American Bar Association, Business Law Section, dated Oct. 2, 2013 ("ABA (October 2013)"); Agricultural Retailers Association, Business Roundtable, Financial Executives International, National Association of Corporate Treasurers, National Association of Manufacturers, U.S. Chamber of Commerce, dated Aug. 21, 2013 ("CDEU"); Futures Options Association, dated Aug. 21, 2013 ("FOA"); Kevin Nixon, Managing Director, Institute of International Finance, dated August 8, 2013 ("IIF"); Koichi Ishikura, Executive Chief of Operations for International Headquarters, Japan Securities Dealers Association, dated Aug. 21, 2013 ("JSDA"); Patrick Pearson, European Commission, dated Aug. 21, 2013 ("EC"); Jonathan Kindred and Shigesuke Kashiwagi, Japan Financial Markets Council, dated Aug. 15, 2013.

The SEC Chair and Commissioners were copied on a comment letter to the CFTC in connection with the CFTC's own cross-border initiative. *See* letter from Sherrod Brown, U.S. Senator, Tom Harkin, U.S. Senator, Jeff Merkley, U.S. Senator, Carl Levin, U.S. Senator, Elizabeth Warren, U.S. Senator, Dianne Feinstein, U.S. Senator, to the Honorable Gary Gensler, dated May 22, 2013 ("U.S. Senators").

[9] *See* Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity that are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent, Exchange Act Release No. 74843 (Apr. 29, 2015), 80 FR 27443 (May 13, 2015) ("U.S. Activity Proposing Release").

[10] *See* letters from Kenneth E. Bentsen, Jr., President & CEO, Securities Industry and Financial Markets Association and Financial Services Roundtable and Rich Foster, Senior Vice President & Senior Counsel for Regulatory and Legal Affairs, Financial Services Roundtable, dated July 13, 2015 ("SIFMA/FSR (July 2015)"); Sarah A. Miller, Chief Executive Officer, Institute of International Bankers, dated July 13, 2015 ("IIB (July 2015)"); Dan Waters, Managing Director, ICI Global, dated July 13, 2015 ("ICI Global (July 2015)"); Dennis M. Kelleher, President and CEO, Stephen W. Hall, Securities Specialist, Todd Phillips, Attorney, Better Markets, Inc., dated July 13, 2015 ("Better Markets (July 2015)"); Timothy W. Cameron, Esq., Managing Director and Laura Martin, Managing Director and Associate General Counsel, Asset Management Group, Securities Industry and Financial Markets Association, dated July 13, 2015 ("SIFMA–AMG (July 2015)"); David Geen, General Counsel, International Swaps and Derivatives Association, Inc. ("ISDA (July 2015)"); Chris Barnard, dated June 26, 2015 ("Barnard (July 2015)"); Stuart J. Kaswell, Executive Vice President, Managing Director & General Counsel, Managed Funds Association, dated July 13, 2015 ("MFA (July 2015)"). These comment letters are available on the Commission's Web site at *http://www.sec.gov/comments/s7-06-15/s70615.shtml*.

[11] If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

[12] The statutory definition of "special entity" includes federal agencies, states and political subdivisions, employee benefit plans as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"), governmental plans as defined under ERISA, and endowments. *See* Rule 15Fh–2(d) (defining "special entity" to include employee benefit plans that are defined in Title I of ERISA but permitting employee benefit plans that are not subject to regulation under Title I of ERISA to elect not to be special entities).

[13] Rule 15Fh–2(a), as adopted, defines what it means to "act as an advisor" to a special entity, and provides a safe harbor under which the parties can establish that the SBS Dealer is not acting as an advisor to the special entity.

Rule 15k–1, as adopted, requires an SBS Entity to designate a CCO and imposes certain duties and responsibilities on that CCO.

B. Cross-Border Application of the Final Rules

Rule 3a71–3(c) and related amendments to Rule 3a71–3(a), as adopted, define the scope of application of the business conduct standards described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B)) to SBS Dealers. As adopted, these rules require a registered U.S. SBS Dealer to comply with transaction-level business conduct requirements with respect to all of its transactions, except for certain transactions conducted through such dealer's foreign branch. The rules further require a registered foreign SBS Dealer to comply with transaction-level business conduct requirements with respect to any transaction with a U.S. person (except for a transaction conducted through a foreign branch of the U.S. person) and any transaction that the SBS Dealer arranges, negotiates, or executes using personnel located in the United States.

Rule 3a67–10(d) and related amendments to Rule 3a67–10(a), as adopted, define the scope of application of the business conduct standards described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B)) to registered Major SBS Participants. As adopted, these rules, like those applicable to registered SBS Dealers, require a registered U.S. Major SBS Participant to comply with transaction-level business conduct requirements with respect to all of its transactions, except for certain transactions conducted through such participant's foreign branch. The rules further require a registered foreign Major SBS Participant to comply with transaction-level business conduct requirements with respect to any transaction with a U.S. person (except for a transaction conducted through a foreign branch of the U.S. person) but not any transaction with a non-U.S. person.

Finally, Rule 3a71–6, as adopted, provides a framework under which foreign SBS Dealers and foreign Major SBS Participants may seek to satisfy certain business conduct requirements under Title VII by means of substituted compliance.

In developing these final rules, including their cross-border application, we have consulted and coordinated with the CFTC and the prudential regulators[14] in accordance with the consultation mandate of the Dodd-Frank Act.[15] The Commission also has consulted and coordinated with foreign regulatory authorities through Commission staff participation in numerous bilateral and multilateral discussions with foreign regulatory authorities addressing the regulation of OTC (over-the-counter) derivatives.[16] Through these discussions and the Commission staff's participation in various international task forces and working groups,[17] we have gathered information about foreign regulatory reform efforts and their impact on and relationship with the U.S. regulatory regime. The Commission has taken and will continue to take these discussions into consideration in developing rules, forms, and interpretations for implementing Title VII of the Dodd-Frank Act.[18]

C. Consistency With CFTC Rules

The Commission and CFTC staffs, prior to the proposal of rules by their respective agency, held approximately 30 joint meetings with interested parties regarding the agencies' respective business conduct rules to solicit a variety of views.[19] As discussed in Section I.D. below, the agencies' staffs also consulted with Department of Labor ("DOL") representatives on this rulemaking. In the Proposing Release, the Commission solicited comment on the impact of any differences between the Commission's and CFTC's approaches to business conduct regulations, and whether the Commission's proposed business conduct regulations should be modified to conform to the proposals made by the CFTC.[20] Subsequently, in February 2012, the CFTC adopted final rules with respect to the external business conduct standards of Swap Entities that are generally consistent with the Commission's proposed rules.[21] In addition, in April 2013, the CFTC adopted final rules with respect to internal business conduct standards regarding, among other things, the obligation of a Swap Entity to diligently supervise its business.[22] These rules also require each Swap Entity to designate a CCO, prescribe qualifications and duties of the CCO, and require that the CCO prepare, sign, and furnish the annual report containing an assessment of the registrant's compliance activities to either the board of directors or the senior officer.[23] The rules further require the annual report to be furnished to the CFTC.[24]

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[14] The term "prudential regulator" is defined in section 1a(39) of the Commodity Exchange Act, 7 U.S.C. 1a(39), and that definition is incorporated by reference in section 3(a)(74) of the Exchange Act, 15 U.S.C. 78c(a)(74). Pursuant to the definition, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, the "prudential regulators") is the "prudential regulator" of a security-based swap dealer or major security-based swap participant if the entity is directly supervised by that regulator.

[15] Section 712(a)(2) of the Dodd-Frank Act provides in part that the Commission shall "consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible."

[16] For example, senior representatives of authorities with responsibility for regulation of OTC derivatives have met on a number of occasions to discuss international coordination of OTC derivatives regulations. *See, e.g.*, Report of the OTC Derivatives Regulators Group to G20 Leaders on Cross-Border Implementation Issues November 2015 (Nov. 2015), available at: *http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/odrgreportg20_1115.pdf*.

[17] Commission representatives participate in the Financial Stability Board's Working Group on OTC Derivatives Regulation ("ODWG"), both on the Commission's behalf and as the representative of the International Organization of Securities Commissions ("IOSCO"), which is co-chair of the ODWG. *See* Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer *De Minimis* Exception, Exchange Act Release No. 77104 (February 10, 2016), 81 FR 8597 n.15 (Feb. 19, 2016) ("U.S. Activity Adopting Release"), (describing the Commission representative's role).

[18] *See* Section 752(a) of the Dodd-Frank Act (providing in part that "[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps.").

[19] A list of Commission staff meetings in connection with this rulemaking is available on the Commission's Web site under "Meetings with SEC Officials" at *http://www.sec.gov/comments/df-title-vii/swap/swap.shtml* and at *http://www.sec.gov/comments/s7-25-11/s72511.shtml*.

[20] *See* Proposing Release, 76 FR at 42438, *supra* note 3.

[21] *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012) ("CFTC Adopting Release").

[22] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2013) ("CFTC CCO Release").

In May 2013, in the Reopening Release, the Commission sought comment on certain specific issues, including: (1) The relationship of the proposed rules to any parallel requirements of other authorities, including the CFTC and relevant foreign regulatory authorities; and (2) with respect to the CFTC rules, whether and to what extent the Commission, in adopting its own rules, should emphasize consistency with the CFTC rules versus adopting rules that are more tailored to the security-based swap market, including any specific examples where consistency or tailoring of a particular rule or rule set is more critically important.[25]

The Commission received numerous comments regarding consistency with the CFTC's external business conduct rules both before and after the CFTC adopted its final rules.[26] Comments specific to individual rules are addressed in the discussions of the respective rules below. As a general matter, these comments had, as an overarching theme, that the Commission should coordinate with the CFTC to achieve consistent regulations.[27] Commenters stressed that differences between the regulatory regimes would, among other things, increase regulatory burdens and costs for market participants, delay execution of transactions, and lead to confusion.[28]

Before the CFTC adopted its final external business conduct rules, commenters were divided as to whether they preferred the Commission's [29] or the CFTC's [30] proposed approach to specific issues, in instances in which the CFTC's proposed approach differed from the Commission's proposed rules. However, the comments received by the Commission in response to the Reopening Release, which was issued after the CFTC adopted its final rules, overwhelmingly urged the Commission to harmonize its external business conduct rules with those of the CFTC because the CFTC's rules have already been implemented by the industry.[31] A number of these comments have suggested specific and detailed modifications. Where we believe the external business conduct rules, if modified in accordance with these suggestions, will continue to provide the protections (as explained in the context of the particular rule) that the rules are intended to accomplish, we have modified the proposed rules to harmonize with CFTC requirements to create efficiencies for entities that have already established infrastructure for compliance with analogous CFTC requirements.[32]

D. Department of Labor ERISA Fiduciary Regulations

Section 15F(h)(2)(C) of the Exchange Act defines the term "special entity" to include "an employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974." [33]

Prior to proposing the business conduct standards rules, the Commission received submissions from commenters concerning the interaction with ERISA, DOL's proposed fiduciary rule, and current regulation regarding the definition of ERISA fiduciaries.[34] As noted above, the Commission, CFTC and DOL staffs consulted on issues regarding the intersection of ERISA fiduciary status with the Dodd-Frank Act business conduct provisions, prior to the Commission's proposing rules in this area.[35]

The Commission received numerous comments concerning the interaction of ERISA and existing fiduciary regulation with the business conduct standards under the Exchange Act and the Commission's proposed rules.[36] Commenters, including ERISA plan sponsors, dealers and institutional asset managers, stated that although ERISA plans currently use security-based swaps as part of their overall hedging or investment strategy, the statutory and regulatory intersections of ERISA and the external business conduct standards under Title VII of the Dodd-Frank Act could prevent ERISA plans from participating in security-based swap markets in the future, and the proposed business conduct standards rules, if adopted without clarification, could have unintended consequences for SBS Entities dealing with ERISA plans.[37]

Commenters were primarily concerned that compliance with the business conduct standards under the Exchange Act or the Commission's proposed rules would cause an SBS Entity to be an ERISA fiduciary to an ERISA plan and thus, subject to ERISA's prohibited transaction provisions.[38] If an SBS Entity were to become an ERISA fiduciary to an ERISA plan, it would be prohibited from entering into a security-based swap with that ERISA plan absent an exemption.[39] One commenter asserted that the penalties for violating ERISA's prohibited transaction provisions would discourage SBS Entities from dealing with ERISA plans.[40] Other commenters asserted that compliance by SBS Entities with the following obligations could cause an SBS Entity to be an ERISA fiduciary: (1) Providing information regarding the risks of the security-based swap; (2) providing the daily mark; (3) reviewing the ability of the special entity's advisor to advise the special entity with respect to the security-based swap; and (4) acting in the best interests of the special entity.[41] Accordingly, commenters requested that the Commission and DOL coordinate the respective rules to clarify that compliance with the business conduct standards rules will not make an SBS Entity an ERISA fiduciary.[42]

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[23] *Id.*

[24] *Id.*

[25] *See* Reopening Release, *supra* note 4.

[26] *See, e.g.,* Barnard, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; AFSCME, *supra* note 5; Levin, *supra* note 5; APPA, *supra* note 5; Ropes & Gray, *supra* note 5; BlackRock, *supra* note 5; Nomura, *supra* note 5; GFOA, *supra* note 5; NABL, *supra* note 5; ISDA (July 2013), *supra* note 5; AFGI (July 2013), *supra* note 5; CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5; SIFMA (September 2015), *supra* note 5; SIFMA (November 2015), *supra* note 5.

[27] *See, e.g.,* Barnard, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; AFSCME, *supra* note 5; Levin, *supra* note 5; APPA, *supra* note 5; Ropes & Gray, *supra* note 5; BlackRock, *supra* note 5; Nomura, *supra* note 5; GFOA, *supra* note 5; NABL, *supra* note 5; ISDA (July 2013), *supra* note 5; AFGI (July 2013), *supra* note 5; SIFMA (August 2015), *supra* note 5; SIFMA, *supra* note 5 (September 2015); SIFMA (November 2015), *supra* note 5.

[28] *See, e.g.,* Barnard, *supra* note 5; Levin, *supra* note 5; BlackRock, *supra* note 5; NABL, *supra* note 5; GFOA, *supra* note 5.

[29] *See, e.g.,* SIFMA (August 2011), *supra* note 5; GFOA, *supra* note 5; NABL, *supra* note 5.

[30] *See, e.g.,* CFA, *supra* note 5.

[31] *See, e.g.,* Nomura, *supra* note 5; GFOA, *supra* note 5; ISDA (July 2013), *supra* note 5; SIFMA (August 2015), *supra* note 5; SIFMA (September 2015), *supra* note 5; SIFMA (November 2015), *supra* note 5.

Commenters also urged, with respect to supervision and CCO obligations ("internal" business conduct standards), that our final rules be informed by industry experience complying with the analogous Financial Industry Regulatory Authority, Inc. ("FINRA") supervision and CCO rules, as well as the CFTC internal business conduct standards. *See* SIFMA (September 2015), *supra* note 5, at 2 (urging the Commission to harmonize its rules with, among other things, "the FINRA Supervision Rules, [and] the FINRA CCO Rule").

[32] One commenter noted that more than 17,000 entities have already adhered to a multilateral protocol that had been developed in response to the CFTC rules. *See* SIFMA (November 2015), *supra* note 5.

[33] 29 U.S.C. 1001 *et seq. See* History of EBSA and ERISA, available at *http://www.dol.gov/ebsa/aboutebsa/history.html.*

[34] *See, e.g.,* letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association and Robert G. Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc. to Elizabeth M. Murphy, Secretary, Commission and David A. Stawick, Secretary, CFTC (Oct. 22, 2010) ("SIFMA/ISDA 2010 Letter"), at 8 n.19. This comment letter is available on the Commission's Web site at *http://www.sec.gov/comments/df-title-vii/swap/swap.shtml.*

[35] *See* Proposing Release, 76 FR at 42398, *supra* note 3.

[36] *See, e.g.,* ABC, *supra* note 5; CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[37] *See, e.g.,* ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[38] Section 406(b) of ERISA (29 U.S.C. 1106(b)) states that an ERISA fiduciary with respect to an ERISA plan shall not (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

[39] In addition to other statutory exemptions, Section 408(a) of ERISA (29 U.S.C. 1108(a)) gives

DOL staff reviewed the CFTC's final business conduct standards rules for Swap Entities and provided the CFTC with the following statement:

> The Department of Labor has reviewed these final business conduct standards and concluded that they do not require swap dealers or major swap participants to engage in activities that would make them fiduciaries under the Department of Labor's current five-part test defining fiduciary advice 29 CFR 2510.3–21(c). In the Department's view, the CFTC's final business conduct standards neither conflict with the Department's existing regulations, nor compel swap dealers or major swap participants to engage in fiduciary conduct. Moreover, the Department states that it is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap dealers and major swap participants who comply with these business conduct standards.[43]

Thereafter, in April 2015, the DOL reproposed a change to the definition of fiduciary under ERISA.[44] The DOL noted that its staff had "consulted with staff of the SEC." [45]

On April 6, 2016, DOL issued its final rule.[46] We understand that DOL's revised definition of "fiduciary" in its final rule is intended to allow SBS Entities to avoid becoming ERISA fiduciaries when acting as counterparties to a swap or security-based swap transaction. For example, DOL makes the following statement in the preamble to its final rule:

> The Department has provided assurances to the CFTC and the SEC that the Department is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap and security-based swap dealers and major swap and security-based swap participants who comply with the business conduct standards. *See, e.g.*, Letter from Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor, to The Hon. Gary Gensler et al., CFTC (Jan. 17, 2012). In this regard, we note that the disclosures required under the business conduct standards, including those regarding material information about a swap or security-based swap concerning material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty's clearing rights; disclosures necessary to ensure fair and balanced communications; and disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, do not in the Department's view compel counterparties to ERISA-covered employee benefit plans, other plans or IRAs to make a recommendation for purposes of paragraph (a) of the final rule or otherwise compel them to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This section of this Notice discusses these issues in the context of the express provisions in the final rule on swap and security-based swap transactions and on transactions with independent fiduciaries with financial expertise.[47]

Furthermore, DOL's final rule establishes a "swap and security-based swap transactions" exclusion [48] which, in DOL's view, is intended to establish conditions under which persons acting as SBS Entities, among others, "do not become investment advice fiduciaries as a result of communications and activities conducted during the course of swap or security-based swap transactions regulated under the Dodd-Frank Act provisions in the Commodity Exchange Act or the Securities Exchange Act of 1934 and applicable CFTC and SEC implementing rules and regulations." [49] In addition, DOL has stated that its exclusion for "transactions with independent plan fiduciaries with financial expertise" has been significantly adjusted and expanded in the final rule and gives an alternative avenue for parties involved in swap, security-based swap, or other investment transactions to conduct the transaction in a way that would ensure they do not become investment advice fiduciaries under the final rule.[50]

The Commission staff has continued to coordinate with DOL staff to ensure that the final business conduct standards rules are appropriately harmonized with ERISA and DOL regulations. DOL staff has provided the Commission with a statement that:

> It is the Department's view that the draft final business conduct standards do not require security-based swap dealers or major security-based swap participants to engage in activities that would make them fiduciaries under the Department's current five-part test defining fiduciary investment advice. 29 CFR 2510.3–21(c). The standards neither conflict with the Department's existing regulations, nor compel security-based swap dealers or major security-based swap participants to engage in fiduciary conduct. Moreover, the Department's recently published final rule amending ERISA's fiduciary investment advice regulation was carefully harmonized with the SEC's business conduct standards so that there are no unintended consequences for security-based swap dealers and major security-based swap participants who comply with the business conduct standards. As explained in the preamble to the Department's final rule, the disclosures required under the SEC's business conduct rules do not, in the Department's view, compel counterparties to ERISA-covered employee benefit plans to make investment advice recommendations within the meaning of the Department's final rule or otherwise compel them to act as ERISA fiduciaries in

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DOL authority to grant administrative exemptions from prohibited transactions prescribed in Section 406 of ERISA.

[40] *See* ABC, *supra* note 5.

[41] *See, e.g.*, ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[42] *See, e.g.*, ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[43] *See* Letter from Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor to The Hon. Gary Gensler *et al.*, CFTC (Jan. 17, 2012), CFTC Adopting Release, Appendix 2—Statement of the Department of Labor, 77 FR 9835, *supra* note 21.

[44] *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 80 FR 21927 (Proposed Rule, Apr. 20, 2015).

[45] *Id.* at 21937.

[46] *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20946 (Final Rule, Apr. 8, 2016).

[47] *Id.* at 20985, n. 36.

[48] *See id.* at 20984–86 (discussing the swap and security-based swap transactions exception).

[49] *Id.* at 20985. *See also id.* (explaining that in DOL's view, "when Congress enacted the swap and security based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA covered plans, Congress did not intend that engaging in regulated conduct as part of a swap or security-based swap transaction with an employee benefit plan would give rise to additional fiduciary obligations or restrictions under Title I of ERISA").

[50] *See id.* at 20986 (noting that DOL "does not believe extending the swap and security-based swap provisions to IRA investors is appropriate" and, rather, concluding "that it was more appropriate to address this issue in the context of the 'independent plan fiduciary with financial expertise' provision described elsewhere in this Notice").

swap and security-based swap transactions conducted pursuant to section 4s(h) of the Commodity Exchange Act and section 15F of the Securities Exchange Act of 1934.[51]

Finally, the Commission has modified its proposed treatment of special entities to take into account the comprehensive regulatory scheme established under ERISA. In particular, as discussed more fully in Section II.H below, if the special entity is an ERISA plan, our rules deem certain requirements satisfied if the plan has an independent representative that is a fiduciary under ERISA.

E. Investment Adviser and Municipal Advisor Status

In addition to questions about ERISA fiduciary status, commenters also questioned whether compliance with the business conduct standards might cause an SBS Entity to be deemed an investment adviser or, when transacting with a special entity that meets the definition of municipal entity, a municipal advisor.[52] Two commenters expressed concern more generally that compliance with the daily mark requirement (in Rule 15Fh–3(c)) might raise questions as to whether an SBS Entity has advisory or fiduciary responsibilities under applicable common law, state law or federal law (*e.g.*, DOL regulations, provisions of the Investment Advisers Act of 1940 (“Advisers Act”), or the Dodd-Frank Act's municipal advisor provisions).[53]

As we noted in the Proposing Release, the duties imposed on an SBS Dealer (or Major SBS Participant) under the business conduct rules are specific to this context, and are in addition to any duties that may be imposed under other applicable law.[54] Thus, an SBS Entity must separately determine whether it is subject to regulation as a broker-dealer, an investment adviser, a municipal advisor or other regulated entity.[55] For example, an SBS Dealer that acts as an advisor to a special entity may fall within the definition of “investment adviser” under Section 202(a)(11) of the Advisers Act.[56]

We further stated in the Proposing Release that an SBS Dealer that acts as an advisor to a municipal entity also may be a “municipal advisor” under Section 15B(e) of the Exchange Act.[57] We note, however, that we subsequently adopted rules in 2013 that interpret the statutorily defined term “municipal advisor” and provide a regulatory exemption for persons engaging in municipal advisory activities in circumstances in which a municipal entity or obligated person is otherwise represented by an independent registered municipal advisor with respect to the same aspects of a municipal financial product or an issuance of municipal securities so long as the following requirements are satisfied: (1) The independent registered municipal advisor is registered pursuant to Section 15B of the Exchange Act and the rules and regulations thereunder, and is not, and within at least the past two years was not, associated with the person seeking to rely on the exemption; (2) the person seeking to use the exemption receives from the municipal entity or obligated person a representation in writing that it is represented by, and will rely on the advice of, the independent registered municipal advisor, and such person has a reasonable basis for relying on the representation; and (3) the person seeking to use the exemption provides written disclosure to the municipal entity or obligated person, with a copy to the independent registered municipal advisor, stating that such person is not a municipal advisor and is not subject to the fiduciary duty to municipal entities that the Exchange Act imposes on municipal advisors, and such disclosure is made at a time and in a manner reasonably designed to allow the municipal entity or obligated person to assess the material incentives and conflicts of interest that such person may have in connection with the municipal advisory activities.[58] We explained that if a municipal entity or obligated person is represented by a registered municipal advisor, parties to the municipal securities transaction and others who are not registered municipal advisors should be able to provide advice to the municipal entity or obligated person without being deemed themselves to be municipal advisors, so long as the responsibilities of each person are clear.[59]

F. Intersection With SRO Rules

Under the framework established in the Dodd-Frank Act, SBS Entities are not required to be members of self-regulatory organizations (“SROs”). Some commenters have, however, urged us to harmonize Title VII business conduct requirements applicable to SBS Entities with relevant SRO requirements applicable to the SRO's members to avoid unnecessary differences, which they argue could create duplication and conflicts when an SBS Entity is also registered as a broker-dealer, or when an SBS Entity uses a registered broker-dealer to intermediate its transactions.[60]

The rules we proposed were designed to implement the business conduct requirements enacted by Congress regarding security-based swap activity of SBS Entities. At the same time, in proposing these rules, we were mindful that an SBS Entity also may engage in activity that will require it to register as a broker-dealer, and thus become subject to SRO rules applicable to registered broker-dealers that may impose similar business conduct requirements.[61] As we noted in the Proposing Release, the existing rules of various SROs served as an important point of reference for our proposed business conduct rules.[62] For example, a number of the proposed rules, including those regarding "know your counterparty," [63] suitability,[64] fair and balanced communications,[65] supervision,[66] and designation of a CCO,[67] were patterned on standards that have been established by SROs for their members. However, we tailored the proposed rules to the specifics of the regulatory scheme for security-based swaps under Title VII.[68]

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[51] *See* Letter from Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor to The Hon. Mary Jo White *et al.*, SEC (Apr. 12, 2016).

[52] *See, e.g.*, FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[53] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[54] *See* Proposing Release, *supra* note 3, 76 FR at 42424.

[55] The Dodd-Frank Act amended the Exchange Act definition of “dealer” so that a person would not be deemed to be a dealer as a result of engaging in security-based swaps with eligible contract participants. *See* Section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), as amended by section 761(a)(1) of the Dodd-Frank Act. The Dodd-Frank Act does not include comparable amendments for persons who act as brokers in swaps and security-based swaps. Because security-based swaps, as defined in Section 3(a)(68) of the Exchange Act, are included in the Exchange Act Section 3(a)(10) definition of “security,” persons who act as brokers in connection with security-based swaps must, absent an exception or exemption, register with the SEC as a broker pursuant to Exchange Act Section 15(a), and comply with the Exchange Act's requirements applicable to brokers.

As discussed in Section I.F, *infra*, the Commission has issued temporary exemptions under the Exchange Act in connection with the revision of the “security” definition to encompass security-based swaps. Among other aspects, these temporary exemptions extended to certain broker activities involving security-based swaps.

[56] *See* 15 U.S.C. 80b–2(a)(11).

[57] *See* 15 U.S.C. 78o–4(e)(4).

[58] *See* Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67509–11 (Nov. 12, 2013) (“Municipal Advisor Registration Release”).

[59] *Id.* at 67471.

[60] *See* IIB (July 2015), *supra* note 10, at 13; SIFMA/FSR (July 2015), *supra* note 10, at 9–10 (due to the possibility of dually registered firms, the Commission and FINRA, “must work to harmonize existing sales practice requirements” because, to the extent requirements differ, “there may be unnecessary duplication and conflicts that cause a disparate impact on security-based swap dealers acting through broker-dealers as compared to other security-based swap dealers.”); SIFMA (September 2015), *supra* note 5, at 2 (urging the Commission to harmonize its rules with, among other things, “the FINRA Supervision Rules, [and] the FINRA CCO Rule”).

[61] *See* Exchange Act Section 15(b)(8) (generally making it illegal for a registered broker-dealer to effect a transaction in, or induce or attempt to induce the purchase or sale of, any security unless it is a member of a registered securities association or effects transactions in securities solely on a national securities exchange of which it is a member). 15 U.S.C. 78o(b)(8).

We recognize, as the commenters noted, that the security-based swap and other securities activities of certain entities may require them to register both as broker-dealers and as SBS Dealers or Major SBS Participants.[69] To the extent an entity will be subject to regulation both as a broker-dealer and as an SBS Entity, there may be overlapping regulatory requirements applicable to the same activity. The Commission is mindful of potential regulatory conflicts or redundancies and has sought in adopting these final rules to avoid such conflicts and minimize redundancies, consistent with the statutory business conduct requirements for SBS Entities. As discussed throughout this release, the rules we are adopting today take into account the comments received, both comments specific to the application of the proposed rules to the security-based swap market and the role that the SBS Entities play in that market, and comments asking us to modify the proposed rules to more closely align with the similar SRO rules applicable to broker-dealers.[70] Overall, we believe that the business conduct rules we are adopting today are generally designed to be consistent with the relevant SRO requirements, taking into account the nature of the security-based swap market and the statutory requirements for SBS Entities.[71]

On July 1, 2011, the Commission issued a separate order granting temporary exemptive relief (the "Temporary Exemptions") from compliance with certain provisions of the Exchange Act in connection with the revision, pursuant to Title VII of the Dodd-Frank Act, of the Exchange Act definition of "security" to encompass security-based swaps.[72] Consistent with the Commission's action, on July 8, 2011, FINRA filed for immediate effectiveness FINRA Rule 0180, which, with certain exceptions, is intended to temporarily limit the application of FINRA rules with respect to security-based swaps, thereby helping to avoid undue market disruptions resulting from the change to the definition of "security" under the Act.[73]

The Commission, noting the need to avoid a potential unnecessary disruption to the security-based swap market in the absence of an extension of the Temporary Exemptions, and the need for additional time to consider the potential impact of the revision of the Exchange Act definition of "security" in light of recent Commission rulemaking efforts under Title VII of the Dodd-Frank Act, issued an order that extended and refined the applicable expiration dates of the previously granted Temporary Exemptions.[74] In the Temporary Exemptions Extension Release, the Commission extended the expiration date of the expiring Temporary Exemptions that are not directly linked to pending security-based swap rulemakings until the earlier of such time as the Commission issues an order or rule determining whether any continuing exemptive relief is appropriate for security-based swap activities with respect to any of these Exchange Act provisions or until three years following the effective date of the

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[62] We looked, in particular, to the requirements imposed by FINRA, the Municipal Securities Rulemaking Board ("MSRB"), and the National Futures Association ("NFA"), in addition to the business conduct standards, both internal and external, adopted by the CFTC.

[63] Proposed Rule 15Fh–3(e). *Cf.* FINRA Rule 2090.

[64] Proposed Rule 15Fh–3(f). *Cf.* FINRA Rules 2090 and 2111.

[65] Proposed Rule 15Fh–3(g). *See* Exchange Act Section 15F(h)(3)C), 15 U.S.C. 78o–10(h)(3)(C). *Cf.* NASD Rule 2210(d)(1)(A).

[66] Proposed Rule 15Fh–3(h). *See* Exchange Act Section 15F(h)(1)(B), 15 U.S.C. 78o–10(h)(1)(B). *Cf.* NASD Rules 3010 and 3012.

[67] Proposed Rule 15Fk–1. *See* Exchange Act Section 15F(k), 15 U.S.C. 78o–10(k). *Cf.* FINRA Rule 3130.

[68] For example, we provided in the proposed rules for an institutional suitability alternative, which was modeled on FINRA's institutional suitability rule (Rule 2111(b)) but tailored to take into account the definition of eligible contract participant included in Title VII, which includes, among other persons, individuals with aggregate amounts of more than $10 million invested on a discretionary basis (or $5 million if hedging), and entities with a net worth of at least $1 million that are hedging commercial risk. *See* discussion in Section II.G.4, *infra.* In addition, proposed Rule 15Fh–3(g) would impose obligations regarding fair and balanced communications that are consistent with, but less detailed than, the obligations imposed on registered broker-dealers under FINRA Rule 2210. *See* Section II.G.5, *infra.*

[69] *See, e.g.,* IIB (July 2015), *supra* note 10. In addition, as noted above, there may instances in which a registered broker-dealer acts on behalf of an SBS Entity, and so both our rules and the SRO business conduct rules may apply to the activity of the broker-dealer in its capacity as agent of the SBS Entity.

[70] One commenter urged harmonization with SRO (as well as CFTC) rules to allow SBS Entities "to leverage existing processes and speed implementation." SIFMA (September 2015), *supra* note 5, at 2.

[71] Generally, when a business conduct standard in these proposed rules is based on a similar SRO standard, we would expect—at least as an initial matter—to take into account the SRO's interpretation and enforcement of its standard when we interpret and enforce our rule. At the same time, we are not bound by an SRO's interpretation and enforcement of an SRO rule, and our policy objectives and judgments may diverge from those of a particular SRO. Accordingly, we would also expect to take into account such differences in interpreting and enforcing our rules. Proposing Release, 76 FR at 42399, *supra* note 3.

[72] *See* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Pending Revision of the Definition of "Security" Encompass Security-based Swaps, and Request for Comment, Exchange Act Release No. 64795 (Jul. 1, 2011), 76 FR 39927 (Jul. 7, 2011) (the "Exemptive Release"). The term "security-based swap" is defined in Section 761 of the Dodd-Frank Act. 15 U.S.C. 78c(a)(68). *See also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (Jul. 18, 2012), 77 FR 48208 (Aug. 13, 2012) ("Products Definitions Adopting Release") for further discussion regarding the meaning of the term security-based swap.

[73] FINRA Rule 0180 temporarily limits the application of certain FINRA rules with respect to security-based swaps. *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt FINRA Rule 0180 (Application of Rules to Security-Based Swaps); File No. SR–FINRA–2011–033, Exchange Act Release No. 64884 (Jul. 14, 2011), 76 FR 42755 (July 19, 2011) ("FINRA Rule 0180 Notice of Filing"). *See also* Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Expiration Date of FINRA Rule 0180 (Application of Rules to Security-Based Swaps); File No. SR–FINRA–2016–001, Exchange Act Release No. 76850 (Jan. 7, 2016), 81 FR 1666 (Jan. 13, 2016) (extending until February 11, 2017 the expiration date of the exemptions under FINRA Rule 0180) ("FINRA Rule 0180 Extension Notice").

In its Exemptive Release, the Commission noted that the relief is targeted and does not include, for instance, relief from the Exchange Act's antifraud and anti-manipulation provisions. FINRA has noted that FINRA Rule 0180 is similarly targeted. For instance, paragraph (a) of FINRA Rule 0180 provides that FINRA rules shall not apply to members' activities and positions with respect to security-based swaps, except for FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices), 3310 (Anti-Money Laundering Compliance Program) and 4240 (Margin Requirements for Credit Default Swaps). *See also* paragraphs (b) and (c) of FINRA Rule 0180 (addressing the applicability of additional rules); FINRA Rule 0180 Notice of Filing; FINRA Rule 0180 Extension Notice.

[74] *See* Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014) ("Temporary Exemptions Extension Release"). *See also* Extension of Exemptions for Security-Based Swaps, Securities Act of 1933 ("Securities Act") Release No. 9545, Exchange Act Release No. 71482 (Feb. 5, 2014), 79 FR 7570 (Feb. 10, 2014) (extending the expiration dates in interim final rules that provide exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 for those security-based swaps that prior to July 16, 2011 were security-based swap agreements and are defined as "securities" under the Securities Act and the Exchange Act as of July 16, 2011 due solely to the provisions of Title VII of the Dodd-Frank Act).

Temporary Exemptions Extension Release.[75] The Commission further extended the expiration date for many expiring Temporary Exemptions directly related to pending security-based swap rulemakings until the compliance date for the related security-based swap-specific rulemaking.[76]

In establishing Rule 0180, and in extending the rule's expiration date,[77] FINRA noted its intent, pending the implementation of any Commission rules and guidance that would provide greater regulatory clarity in relation to security-based swap activities, to align the expiration date of FINRA Rule 0180 with the termination of relevant provisions of the Temporary Exemptions provided by the Commission, so as to avoid undue market disruptions resulting from the change to the definition of "security" under the Exchange Act.

II. Discussion of Rules Governing Business Conduct

A. Scope, Generally

1. Proposed Rule

Proposed Rule 15Fh–1 would provide that Rules 15Fh–1 through 15Fh–6 (governing business conduct) and Rule 15Fk–1 (requiring designation of a CCO) are not intended to limit, or restrict, the applicability of other provisions of the federal securities laws, including but not limited to Section 17(a) of the Securities Act, Sections 9 and 10(b) of the Exchange Act, and the rules and regulations thereunder. Additionally, it would provide that Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 would not only apply in connection with entering into security-based swaps but also would continue to apply, as appropriate, over the term of executed security-based swaps.

In the Proposing Release, the Commission solicited comment on the scope of the business conduct rules, including whether the rules should apply to transactions between an SBS Entity and its affiliates, whether any of the rules should apply to security-based swaps that were entered into prior to the effective date of the rules, and to the extent that any of the rules were intended to provide additional protections for a particular counterparty, whether the counterparty should be able to opt out of those protections.[78]

2. Comments on the Proposed Rule

a. General

Eleven commenters addressed the general scope of the proposed business conduct standards.[79] One commenter recommended that the Commission apply the proposed rules to security-based swaps that are offered as well as those that are executed.[80] The other commenters addressed: The application of the rules to inter-affiliate transactions, the application of the rules to security-based swaps entered into prior to the effective date, and whether counterparties should be able to opt out of the protections provided by the rules.

b. Application to Security-Based Swaps Entered Into Prior to the Effective Date

Seven commenters addressed the application of the rules to security-based swaps that were entered into prior to the compliance date of the rules, and all seven recommended that the rules not apply to such transactions.[81] Three further indicated that the rules should not generally apply to amendments to, or other lifecycle events arising under, a security-based swap that was executed before the compliance date of the rules.[82] Another commenter also specifically argued that the rules should not apply to either partial or full terminations of security-based swaps executed prior to the compliance date, or the exercise of an option on a security-based swap where the option was executed prior to the compliance date.[83]

One commenter argued that amendments to existing transactions typically do not alter the risk and other characteristics of a transaction sufficiently to merit application of the rules and that application of the rules in these cases may frustrate their purpose.[84] Others believed that any potential retroactive application would be burdensome, noting that it would undermine the expectations that the parties had when entering into the security-based swap.[85]

c. Application to Inter-Affiliate Transactions

Three commenters discussed the application of the rules to inter-affiliate transactions.[86] All three recommended that the rules generally not apply to security-based swap transactions between affiliates,[87] but one recognized that entity-level requirements (such as CCO and supervision responsibilities) will necessarily apply.[88] One commenter asserted that the rules are intended to protect investors in arm's length transactions and therefore, would be irrelevant in inter-affiliate transactions.[89] The second commenter similarly argued that because affiliates are not "external clients" of the SBS Entity, the protections afforded by the rules are inapposite.[90] The second commenter also suggested that the Commission define "affiliate" to mean an entity that is "under common control and that reports information or prepares its financial statements on a consolidated basis" with another entity, and opined that the definition should be consistently applied across Title VII rulemakings.[91] The third commenter also advocated for a common control standard, arguing that the rules should not apply to transactions between an SBS Entity and "a person controlling, controlled by, or under common control with the [SBS Entity]."[92]

d. Counterparty Opt-Out

Nine commenters addressed whether to permit counterparties to opt out of certain protections provided by the rules.[93] Six commenters were in favor of allowing an opt out in at least some circumstances,[94] and three were against it.[95]

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[75] *See* Temporary Exemptions Extension Release, 79 FR at 7734, supra note 74. These Temporary Exemptions are currently scheduled to expire in February 2017.

[76] *Id.* at 7731. The Commission extended a subset of the Temporary Exemptions until they are addressed within relevant rulemakings relating to: (i) Capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants, (ii) recordkeeping and reporting requirements for security-based swap dealers and major security-based swap participants, (iii) security-based swap trade acknowledgement rules, and/or (iv) registration requirements for security-based swap execution facilities.

[77] As noted in the FINRA Rule 0180 Extension Notice, FINRA has indicated that it intends to amend the expiration date of Rule 0180 in subsequent filings as necessary such that the expiration date will be coterminous with the termination of relevant provisions of the Temporary Exemptions.

[78] *See* Proposing Release, 76 FR at 42401–42402, *supra* note 3.

[79] *See* CFA, *supra* note 5; ABA Securities Association, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5; NABL, *supra* note 5; AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5; CalPERS (August 2011), *supra* note 5; ABC, *supra* note 5; MFA, *supra* note 5; CalSTRS, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[80] *See* CFA, *supra* note 5.

[81] *See* SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5; ABC, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[82] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[83] *See* SIFMA (August 2015), *supra* note 5.

[84] *See* FIA/ISDA/SIFMA, *supra* note 5.

[85] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5; SIFMA (August 2011), *supra* note 5.

[86] *See* ABA Securities Association, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[87] *See* ABA Securities Association, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[88] *See* ABA Securities Association, *supra* note 5.

[89] *See* FIA/ISDA/SIFMA, *supra* note 5.

[90] *See* ABA Securities Association, *supra* note 5.

[91] *Id.*

[92] *See* SIFMA (August 2015), *supra* note 5.

Three commenters suggested that the Commission permit institutional or "sophisticated investors" to opt out of provisions intended to protect counterparties.[96] Specifically, one endorsed allowing "qualified institutional buyers" as defined in Rule 144A under the Securities Act and institutions with total assets of $100 million or more to opt out, asserting that the costs, delays in execution, and requirements to make detailed representations and disclosure to the SBS Entity may outweigh the benefits that such counterparties would receive.[97] Another asserted that "sophisticated" counterparties should be able to opt out of receiving "material information" disclosures and the written disclosures related to clearing rights to lower their hedging costs and avoid potential trading delays and inefficiencies.[98]

Three other commenters suggested an opt out for specific types of counterparties.[99] One suggested that an ERISA plan should be permitted to opt out because SBS Entities might use the information they receive as a result of compliance with the business conduct standards to disadvantage the ERISA plan.[100] A second asserted that pension funds acting as end users should be allowed to opt out of any rules that impose "heightened fiduciary duties" on SBS Dealers because pension funds do not need extra protection, and compliance with the fiduciary duties would only increase costs for SBS Dealers, leading them to either pass the costs along or refrain from entering into transactions with pension funds.[101] A third suggested that any entity advised by a qualified independent representative should be able to waive the protections of the rules to avoid execution delays and administrative costs.[102]

Three commenters opposed allowing counterparties to opt out of the special protections in the rules.[103] One commenter noted that a "theoretically optional opt out would likely become mandatory" because SBS Dealers would make it a condition of doing business, and that an opt-out approach could be used to perpetuate abuses the rules are intended to prevent.[104] Another commented that an opt-out would "only add confusion to an already complex regulatory framework and create opportunities for market participants to evade compliance with the much-needed business conduct standards." [105] A third specifically opposed allowing counterparties to opt out of the disclosure requirements, noting that even sophisticated investors may be misled.[106]

3. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–1, predesignated as Rule 15Fh–1(a), with certain modifications.

a. General

The Commission is adopting, as proposed, the provision in final Rule 15Fh–1(a) specifying that Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 apply "in connection with entering into security-based swaps" and also will continue to apply, as appropriate, over the term of executed security-based swaps. Many of the rules impose obligations on an SBS Entity with respect to its "counterparty" that must be satisfied before the SBS Entity has actually entered into a security-based swap with that counterparty (*e.g.*, Rule 15Fh–3(a) (verification of counterparty status) and Rule 15Fh–3(b) (disclosure of material risks and characteristics, and material incentives or conflicts of interest)). This is consistent with the language specifying that the rules apply "in connection with entering into security-based swaps" in Rule 15Fh–1(a). Accordingly, when the rules refer to a "counterparty" of the SBS Entity, the term "counterparty" includes a potential counterparty where compliance with the obligation is required before the SBS Entity and the "counterparty" has actually entered into the security-based swap.[107]

b. Application to Security-Based Swaps Entered Into Prior to the Effective Date

To address concerns raised by commenters,[108] the Commission is clarifying that the business conduct rules generally will not apply to any security-based swap entered into prior to the compliance date of the rules, and generally will apply to any security-based swap entered into after the compliance date of these rules, including a new security-based swap that results from an amendment or modification to a pre-existing security-based swap.[109]

In response to commenters' concerns about applying the business conduct rules to amendments to and other lifecycle events of a security-based swap entered into before the compliance date of these rules,[110] the Commission is clarifying that the business conduct rules generally will not apply to amendments or modifications to a pre-existing security-based swap unless the amendment or modification results in a new security-based swap (and occurs after the compliance date of these rules). The Commission has previously determined that if the material terms of a security-based swap are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the amended or modified security-based swap is viewed as a new security-based swap.[111] Thus, if there is such a material amendment or modification, which could include a change in the economic terms of the transaction that the parties would not have provided for when entering into the security-based swap contract, the Commission will consider the amended or modified security-based swap to be a new security-based swap for purposes of the business conduct rules. If that material amendment or modification occurs after the compliance date of these rules, these rules will apply to the resulting new security-based swap.

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[93] *See* FIA/ISDA/SIFMA, *supra* note 5; CalPERS (August 2011), *supra* note 5; SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; MFA, *supra* note 5; CalSTRS, *supra* note 5; CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Levin, *supra* note 5.

[94] *See* FIA/ISDA/SIFMA, *supra* note 5; CalPERS (August 2011), *supra* note 5; SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; MFA, *supra* note 5; CalSTRS, *supra* note 5.

[95] *See* CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Levin, *supra* note 5.

[96] *See* FIA/ISDA/SIFMA, *supra* note 5; CalPERS (August 2011), *supra* note 5; MFA, *supra* note 5.

[97] *See* FIA/ISDA/SIFMA, *supra* note 5.

[98] *See* MFA, *supra* note 5.

[99] *See* ABC, *supra* note 5; CalSTRS, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[100] *See* ABC, *supra* note 5.

[101] *See* CalSTRS, *supra* note 5.

[102] *See* SIFMA (August 2011), *supra* note 5.

[103] *See* CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Levin, *supra* note 5.

[104] *See* CFA, *supra* note 5.

[105] *See* Better Markets (August 2011), *supra* note 5.

[106] *See* Levin, *supra* note 5.

[107] We believe that our reading of the term "counterparty" to include a potential counterparty addresses the concerns raised by the commenter that requested that the Commission apply the rules to security-based swaps that are offered as well as those that are executed. *See* CFA, *supra* note 5.

[108] *See* SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5; ABC, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[109] *See infra* Sections IV.B and C (discussing the compliance dates of these rules).

[110] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[111] *See* Products Definitions Adopting Release, *supra* note 72, 77 FR at 48286 ("If the material terms of a Title VII instrument are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commissions view the amended or modified Title VII instrument as a new Title VII instrument.").

In response to concerns raised by a commenter, the Commission also is clarifying that the rules generally will not apply to either a partial or full termination of a pre-existing security-based swap.[112] In these instances we anticipate that the expectations of the parties will be governed by the pre-existing terms of the original security-based swap, and so the business conduct requirements generally will not apply. If, however, the partial termination involves a change in the material terms of the original security-based swap "based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula" the business conduct rules will apply.

As requested by a commenter,[113] we are clarifying that the business conduct rules generally will not apply to a new security-based swap that results from the exercise of an option on a security-based swap (whether or not the exercise occurs before or after the compliance date of these rules), as long as the terms upon which a party can exercise the option and the terms of the underlying security-based swap that will result upon the exercise of the option are governed by the terms of the pre-existing option. If, however, the material terms of either the option or the resulting security-based swap are amended or modified based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, our business conduct rules will apply to the amended or modified option or security-based swap resulting from the exercise of the option (assuming that such amendment or modification occurs after the compliance date of these rules).

We believe it appropriate to apply the rules in this manner to help to ensure that counterparties receive the benefits of the rules in circumstances where they are warranted, while providing firms adequate time to review the business conduct rules being adopted today and make appropriate changes to their operations before they have to begin complying with those rules.

The Commission emphasizes that the above clarifications relate to the business conduct rules that by their terms apply when an SBS Entity offers to enter into or enters into a security-based swap, such as verification of status (Rule 15Fh–3(a)), certain disclosures (Rule 15Fh–3(b) and (d)), requirements for special entities as counterparties (Rule 15Fh–5), and pay-to-play (Rule 15Fh–6)). Other rules being adopted today are broader in their application, such as those relating to know your counterparty (Rule 15Fh–3(e)), recommendations of security-based swaps or trading strategies (Rule 15Fh–3(f)), fair and balanced communications (Rule 15Fh–3(g)), supervision (Rule 15Fh–3(h)), antifraud (Rule 15Fh–4(a)), requirements when an SBS Dealer is acting as an advisor to a special entity (Rule 15Fh–4(b)), and the CCO (Rule 15Fk–1). Thus, if an SBS Entity takes an action after the compliance date that independently implicates one of the business conduct rules, it will need to comply with the applicable requirements. For example, if an SBS Dealer makes a recommendation of a trading strategy that involves termination of a pre-existing security-based swap, the SBS Dealer would need to comply with the suitability requirements of Rule 15Fh–3(f) regarding such recommendation. In addition, an SBS Entity will need to comply with "entity level" rules relating to supervision and CCO after the compliance date of those rules for all of its security-based swap business.

c. Application to Inter-Affiliate Transactions

The Commission agrees with the concerns raised by commenters regarding the treatment of inter-affiliate transactions.[114] As the Commission noted in the Definitions Adopting Release (defined below), market participants may enter into inter-affiliate security-based swaps for a variety of purposes, such as to allocate risk within a corporate group or to transfer risks within a corporate group to a central hedging or treasury entity.[115] As discussed below, we believe that transactions by SBS Entities with certain of their affiliated persons do not implicate the concerns that the business conduct requirements regarding verification of counterparty status (Rule 15Fh–3(a)), disclosures regarding the product and potential conflicts of interest, daily mark and clearing rights (Rule 15Fh–3(b), (c) and (d)), "know your counterparty" and suitability obligations (Rules 15Fh–3(e) and (f)), and obligations when advising or acting as counterparty to a special entity (Rules 15Fh–4(b) and 15Fh–5) are intended to address (referred to as "transaction specific obligations").[116] We therefore are providing in Rule 15Fh–1(a) as adopted that Rules 15Fh–3(a) through (f), 15Fh–4(b) and 15Fh–5 are not applicable to security-based swaps that SBS Entities enter into with certain affiliates.

We are not, however, extending the exception to transactions with all affiliates, as requested by some commenters.[117] Rather, the Commission is limiting the exception from the business conduct requirements to security-based swap transactions between majority-owned affiliates. The rule defines "majority-owned affiliates" consistent with the Definitions Adopting Release such that, for these purposes, the counterparties to a security-based swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where "majority interest" is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.[118]

The transaction-specific obligations outlined above and included in Rule 15Fh–1(a) generally are designed to provide an SBS Entity counterparty with certain information in connection with the security-based swap transaction that would help reduce potential information asymmetries, and to help ensure that the SBS Entity knows its counterparty and acts in a fair manner towards that counterparty, even in the face of potential conflicts of interest. The Commission does not believe that these objectives and concerns are implicated in the same manner or to the same extent when there is an alignment of economic interests between the SBS Entity and a counterparty, such as is the case when the counterparty is a majority-owned affiliate. However, absent majority ownership, we cannot be confident that there would be an alignment of economic interests that is sufficient to eliminate the concerns that underpin the need for regulation in this area.[119] Accordingly, the Commission is modifying Rule 15Fh–1(a) to provide that Rules 15Fh–3(a)–(f), 15Fh–4(b) and 15Fh–5 are not applicable to security-based swaps that SBS Entities enter into with their majority-owned affiliates. These generally are the transaction specific exceptions requested by a commenter.[120]

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[112] *See* SIFMA (August 2015), *supra* note 5.

[113] *Id.*

[114] *See* ABA Securities Association, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[115] *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596, 30624–30625 (May 23, 2012) ("Definitions Adopting Release").

[116] As one commenter suggested, because affiliates are not "external clients" of the SBS Entity, the protections afforded by these rules may be inapposite. *See* ABA Securities Association, *supra* note 5.

[117] *See* SIFMA (August 2015), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5. *See also* ABA Securities Association, *supra* note 5 (suggesting an "affiliated group" definition that was considered but not adopted in the Definitions Adopting Release). As noted above, the Commissions instead adopted the exception for "majority-owned affiliates" that we are providing here. *See* Definitions Adopting Release, *supra* note 115.

[118] *See* Exchange Act Rules 3a71–1(d)(1) and 15Fh–1(a).

Further, consistent with the commenter's request, we are not granting an exception for transactions with affiliates with respect to the antifraud requirements of Rule 15Fh–4(a) or the requirements of Rule 15Fh–3(g) (fair and balanced communications).[121] The exception for inter-affiliate transactions from the transaction specific obligations discussed above is generally predicated on the assumption that entities with aligned economic interests have an incentive to act fairly when dealing with each other. However, we believe it important to continue to provide the protections of the antifraud and fair and balanced communication rules in situations where an SBS Entity acts in a manner contrary to this assumption. We also are not granting exceptions to the entity-level requirements regarding supervision (Rule 15Fh–3(h)) and CCO obligations (Rule 15Fk–1), which are intended to help to ensure the compliance of SBS Entities in their security-based swap transactions.

d. Counterparty Opt-Out

The Commission has considered the concerns raised by commenters[122] and determined, on balance, not to permit counterparties generally to opt out of the protections provided by the business conduct rules. As discussed throughout the release in the context of specific rules, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections and so do not think it appropriate to permit parties generally to elect to "opt out" of the benefits of those provisions.[123]

While we are not adopting a general opt-out provision, as discussed below in connection with the relevant rules, the Commission has determined to permit means of compliance with the final rules that should promote efficiency and reduce costs (*e.g.*, Rule 15Fh–1(b) (reliance on representations)) and, where appropriate, allow SBS Entities to take into account the sophistication of the counterparty (*e.g.*, Rule 15Fh–3(f) (regarding recommendations of security-based swaps or trading strategies)).

B. Exceptions for Anonymous SEF or Exchange-Traded Transactions

Section 15F(h)(7) of the Exchange Act provides a statutory exception "from the requirements of this subsection" for security-based swap transactions that are: "(A) initiated by a special entity on an exchange or security-based swaps execution facility; and (B) the security-based swap dealer or major security-based swap participant does not know the identity of the counterparty to the transaction."[124] More generally, commenters have asked the Commission to provide exceptions to the application of our rules in situations in which an SBS Entity does not know the identity of its counterparty, or where a security-based swap transaction is executed on a registered national securities exchange or security-based swap execution facility ("SEF"), without regard to whether the counterparty is a special entity.[125]

1. Proposal

Noting that there may be circumstances in which it may be unclear which party "initiated" the communications that resulted in the parties entering into a security-based swap transaction on a registered SEF or registered national securities exchange, the Commission proposed to interpret Section 15F(h)(7) to apply to any transaction with a special entity on a registered SEF or registered national securities exchange, where the SBS Entity does not know the identity of its counterparty at any time up to and including execution of a transaction.

The Commission further proposed to interpret Section 15F(h)(7) to apply with respect to requirements specific to dealings with special entities. Proposed Rule 15Fh–4(b)(3) would provide an exception from the special requirements for SBS Dealers acting as advisors to special entities, including the requirement that an SBS Dealer act in the best interests of a special entity for whom it acts as an advisor, if the transaction is executed on a registered exchange or SEF and the SBS Dealer does not know the identity of the counterparty at any time up to and including execution of the transaction. Under the same circumstances, proposed Rule 15Fh–5(c) would similarly provide an exception from the special requirements for SBS Entities acting as counterparties to special entities, including the qualified independent representative and disclosure requirements of proposed Rule 15Fh–5.[126] Proposed Rule 15Fh–6(b)(2)(iii) would provide an exception from the pay to play rules with respect to transactions on a registered exchange or SEF where the SBS Dealer does not know the identity of the counterparty at any time up to and including execution of the transaction.[127]

Consistent with Section 15F(h)(7), we also proposed to limit the application of certain other requirements to situations in which the identity of a counterparty (whether a special entity or not) is known to the SBS Entity. The rules as proposed would limit the verification of counterparty status obligations (proposed Rule 15Fh–3(a)),[128] and know your counterparty obligations (proposed Rule 15Fh–3(e)) to transactions with counterparties whose identity is known to the SBS Entity.[129]

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[119] *See* Definitions Adopting Release, 77 FR at 30625, *supra* note 115 (declining to adopt a "common control" standard, noting that, "[a]bsent majority ownership, we cannot be confident that there would be an alignment of economic interests that is sufficient to eliminate the concerns that underpin dealer regulation.").

[120] *See* SIFMA (August 2015), *supra* note 5 (requesting exceptions with respect to Rules 15Fh–3(a) through (f), 15Fh–4(b) and 15Fh–5).

[121] *See id.*

[122] *See* FIA/ISDA/SIFMA, *supra* note 5; CalPERS (August 2011), *supra* note 5; SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; MFA, *supra* note 5; CalSTRS, *supra* note 5; CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Levin, *supra* note 5.

[123] However, as discussed in Section II.H.1.c.iii below, in order to resolve any tension between Exchange Act Sections 15F(h)(2)(C)(iii) and (iv), we are allowing employee benefit plans that are defined in Section 3 of ERISA but not subject to Title I of ERISA to opt out of special entity status.

[124] 15 U.S.C. 78o–10(h)(7).

[125] *See, e.g.*, SIFMA (August 2011), *supra* note 5; BlackRock, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[126] *See* Section II.H.8, *infra* for a discussion of the proposed exceptions from the requirements of Rules 15Fh–4(b) and 15Fh–5.

[127] Rule 15Fh–6, as proposed, would apply only with respect to transactions "initiated" by a municipal entity. The Commission is modifying the exception under Rule 15Fh–6(b)(2)(iii) to apply to all security-based swap transactions that are executed on a registered national securities exchange or registered or exempt SEF, rather than just with respect to transactions "initiated by a municipal entity" on such exchange or registered SEF (as long as the other conditions of Rule 15Fh–6(b)(2)(iii) are met). These revisions are consistent with the exceptions to Rules 15Fh–4 and 15Fh–5 for anonymous, exchange-traded or SEF transactions. *See* Section II.H.9, *infra*.

[128] *See* Section II.G.1, *infra*.

2. Comments on the Proposal

The Commission received five comment letters that addressed the exception for anonymous, exchange or SEF-traded security-based swaps in the context of special entity-specific requirements,[130] and four comment letters that addressed more broadly the issue of an exception for anonymous or SEF and exchange-traded security-based swaps.[131] The comment letters that address the exception in the context of the special entity requirements are discussed *infra* in Sections II.H.8 and II.H.9. The comment letters that address the broader issue of an exception from business conduct requirements for anonymous or SEF and exchange-traded security-based swaps are discussed below.

Two commenters asserted that, where a security-based swap is cleared (through registered clearing organizations) and SEF or exchange-traded, the transaction should not be subject to the requirements of the proposed rules—regardless of whether the identity of the counterparty is known at the time of execution.[132] The commenters argued that knowledge or identification of a counterparty's identity should not compel compliance with the business conduct standards.[133] The commenters further argued that the concerns addressed by business conduct standards were largely inapplicable to security-based swaps entered into through registered SEFs, swap execution facilities or registered national securities exchanges.[134] The commenters asserted that compliance with the proposed rules would result in delay, additional complexity, individual negotiation and potentially less transparency, which the trading and clearing requirements of the Dodd-Frank Act sought to avoid.[135]

However, one of the commenters acknowledged that some security-based swaps executed on a SEF or exchange might be bilaterally negotiated, and the SEF or exchange subsequently used to process the trade, in which case it might be appropriate to apply the business conduct standards.[136]

After adoption of the CFTC's business conduct standards, one commenter urged the Commission to adopt an exception for exchange-traded security-based swaps that are intended to be cleared if: (1)(a) The transaction is executed on a registered or exempt SEF or registered national securities exchange; and (b) is of a type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Exchange Act; or (2) the SBS Entity does not know the identity of the counterparty, at any time up to and including execution of the transaction.[137] The commenter argued that these changes would harmonize the scope of the Commission's requirements with the scope of the parallel requirements under the relief provided by CFTC No-Action Letter 13–70.[138] The commenter argued that the considerations on which the CFTC staff based its no-action relief would also apply to the security-based swap market, namely: "(i) the impossibility or impracticability of compliance with certain rules by a Swap Entity when the identity of the counterparty is not known prior to execution; (ii) the likelihood that swaps initiated anonymously on a designated contract market or swap execution facility will be standardized and, thus, information about the material risks and characteristics of such swaps is likely to be available from the designated contract market or swap execution facility or other widely available source (including the product specifications of a derivatives clearing organization where the swaps are accepted for clearing); and (iii) the likelihood that such relief would provide an incentive to transact on designated contract markets and swap execution facilities, thus enhancing transparency in the swaps market." [139]

3. Response to Comments and Final Rules

After considering the comments, the Commission has determined to adopt two sets of exceptions from the business conduct requirements. As discussed in Sections II.H.8 and II.H.9, *infra*, we are adopting exceptions from the requirements of Rules 15Fh–4(b), 15Fh–5 and 15Fh–6 (collectively, "special entity exceptions") for anonymous transactions executed on a registered national securities exchange or a registered or exempt SEF, where the identity of the special entity is not known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule.[140]

In addition to the special entity exceptions, the Commission is adopting a second set of exceptions that are not limited to transactions with special entities, under which certain of the business conduct standards rules will apply only where the SBS Entity knows the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule.[141] These exceptions are intended to address the impracticalities and potential business disruption that could result if an SBS Entity were required to comply with the disclosure requirements in Rule 15Fh–3(b) (requiring an SBS Entity to disclose material risks and characteristics of a security-based swap and material incentives or conflicts in connection with a security-based swap, prior to entering into that security-based swap with a counterparty) and Rule 15Fh–3(d) (requiring certain pre-transaction disclosures to counterparties regarding clearing rights), before learning the identity of its counterparty.[142] By only applying these rules' requirements to situations where the counterparty's identity is known "at a reasonably sufficient time prior to" the execution of a transaction, the rules' requirements are limited to situations where an SBS

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[129] *See* Sections II.G.1 and II.G.3, *infra*.

[130] *See* ABC, *supra* note 5; CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5; Better Markets (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[131] *See* SIFMA (August 2011), *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2015), *supra* note 5

[132] *See* SIFMA (August 2011), *supra* note 5 (arguing that parties to exchange-traded security-based swaps likely know the identity of their counterparty before the transaction, either because the exchange uses a request for quote system (where the participants can seek quotes from specific counterparties) or a single-dealer platform, or because information about the counterparties to the trade is necessary to complete the execution process); BlackRock, *supra* note 5.

[133] *See* SIFMA (August 2011), *supra* note 5 ("mere knowledge"); BlackRock, *supra* note 5 ("mere identification").

[134] *See* SIFMA (August 2011), *supra* note 5 ("largely inapplicable"); BlackRock, *supra* note 5 ("simply will not be an issue").

[135] *See* SIFMA (August 2011), *supra* note 5; BlackRock, *supra* note 5.

[136] *See* BlackRock, *supra* note 5 (also noting that, conversely, generally "when a swap or a security-based swap is cleared and exchange-traded, the counterparty to the trade should be viewed as fungible, rendering compliance with the specific requirements of [the proposed rules] unnecessary").

[137] *See* SIFMA (August 2015), *supra* note 5.

[138] *Id. See Swaps Intended to Be Cleared*, CFTC Letter No. 13–70 (Nov. 15, 2013), available at *http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-70.pdf.*

[139] *Id.*

[140] *See* Rules 15Fh–4(b)(3)(ii), 15Fh–5(d)(2) and 15Fh–6(b)(3)(iii). We have similarly modified the verification of special entity counterparty status requirements in Rule 15Fh–3(a)(2), as discussed *infra* in Section II.G.1.

[141] *See* ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[142] As discussed in Section II.G.3, *infra,* we are adopting as proposed the exception in Rule 15Fh–3(e), which limits SBS Dealers' counterparty obligations under the rule to transactions with "known" counterparties.

Entity has sufficient time before the execution of the transaction to comply with its obligations under the rules. For this reason, we decline to adopt language, suggested by a commenter, which would apply the exception to circumstances where the identity of the counterparty "is not known at any time up to and including execution of the transaction." [143]

We are not, however, accepting the commenter's suggestion that we revise our exceptions to provide an exception for transactions intended to be cleared so long as the transaction is either executed on a registered national securities exchange or registered or exempt SEF and required to be cleared pursuant to Section 3C of the Exchange Act, regardless of whether or not the transaction is anonymous.[144] Similarly, we reject commenters' more general assertions that the exceptions should apply to all SEF or exchange-traded transactions, even where the identity of the counterparty is known,[145] and that the protections provided by the business conduct standards are unnecessary for security-based swaps that are entered into through registered SEFs, swap execution facilities or registered national securities exchanges.[146] The rules being adopted today are intended to provide certain protections for counterparties, and we think it is appropriate to apply the rules, to the extent practicable, so that counterparties receive the benefits of those protections. We have determined not to apply those rules where it may not be possible or practical to do so, specifically where a transaction is executed on a registered exchange or SEF and the identity of the counterparty is not known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule. However, where the identity of the counterparty is known in a timely manner, we believe that it is appropriate to apply the rules so that the counterparty receives the benefits of the protections provided by the rules, including the assistance of an advisor or qualified independent representative acting in the best interests of a counterparty that is special entity.

C. Application of the Rules to SBS Dealers and Major SBS Participants

1. Proposal

As noted in the Proposing Release, in general, where the Dodd-Frank Act imposes a business conduct requirement on both SBS Dealers and Major SBS Participants, we proposed rules that would apply to SBS Dealers and Major SBS Participants.[147] Where, however, a business conduct requirement is not expressly addressed by the Dodd-Frank Act, the proposed rules generally applied only to SBS Dealers.[148] We solicited comment on whether this approach was appropriate. Specifically, where the Dodd-Frank Act requires that a business conduct rule apply to all SBS Entities, we asked if the rule should impose the same requirements on Major SBS Participants as on SBS Dealers, and where we proposed rules for SBS Dealers that are not expressly addressed by the Dodd-Frank Act, we asked if any of those rules should also apply to Major SBS Participants.

2. Comments on the Proposal

Three commenters addressed the general application of the rules to SBS Dealers and Major SBS Participants.[149] One commenter agreed it may be appropriate, "in light of their somewhat different roles," to adopt different approaches to rules governing SBS Dealers and Major SBS Participants in certain areas.[150] The commenter asserted that absent an affirmative reason to adopt a different approach for SBS Dealers and Major SBS Participants, the Commission should seek to promote consistency and adopt uniformly strong rules.[151] The commenter argued that the determining factor should be whether Major SBS Participants are likely to be engaged in conduct that would appropriately be regulated under the relevant standard.[152]

In contrast, another commenter urged the Commission to consider separate regulatory regimes for SBS Dealers and Major SBS Participants, arguing that they are different, and there are "different reasons why the Dodd-Frank Act requires additional oversight of each." [153] The commenter recommended that the Commission focus regulation of Major SBS Participants on reducing default risk, and focus regulation of SBS Dealers on market making and pricing and sales practices in addition to reducing default risk.[154] The commenter argued that to the extent Major SBS Participants transact at arm's-length, they will not be advising counterparties and therefore, neither fiduciary duties nor "dealer-like obligations" (regarding "know your counterparty," suitability and "pay-to-play" restrictions, for example) should be imposed on them.[155]

A third commenter generally supported our proposed approach in not applying certain business conduct requirements to Major SBS Participants where the Dodd-Frank Act does not expressly impose such standards.[156] In the alternative, if the Commission determines to require Major SBS Participants to disclose "material information" and to provide daily marks to their counterparties, the commenter asked that we make these requirements inapplicable to transactions between a Major SBS Participant and an SBS Dealer, and to allow all other parties to opt out of receiving such disclosures in their dealings with a Major SBS Participant.[157]

3. Response to Comments and Final Rules

After considering the comments, the Commission has determined to apply the rules to SBS Dealers and Major SBS Participants as proposed. To that end, as discussed below, where a statutory provision encompasses both SBS Dealers and Major SBS Participants,[158]

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[143] *See* SIFMA (August 2015), *supra* note 5.

[144] *Id.*

[145] *See* SIFMA (August 2011), *supra* note 5; BlackRock, *supra* note 5.

[146] *See* SIFMA (August 2011), *supra* note 5.

[147] *See* Proposing Release, 76 FR at 42400–42401, *supra* note 3.

[148] As noted in the Proposing Release, there are exceptions to this principle. We proposed that all SBS Entities be required to determine if a counterparty is a special entity. In addition, Section 3C(g)(5) of the Exchange Act creates certain rights with respect to clearing for counterparties entering into security-based swaps with SBS Entities but does not require disclosure. We proposed a rule that would require an SBS Entity to disclose to a counterparty certain information relating to these rights. *See* 15 U.S.C. 78c–3(g)(5); Proposing Release, 76 FR at 42401 n.39, *supra* note 3.

[149] *See* CFA, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5.

[150] *See* CFA, *supra* note 5.

[151] *Id.*

[152] *Id.*

[153] *See* MFA, *supra* note 5.

[154] *Id.*

[155] *Id.*

[156] *See* BlackRock, *supra* note 5.

[157] *Id.*

[158] *See* Section 15F(h)(1) (requiring SBS Dealers and Major SBS Participants to conform to business conduct standards as prescribed by Section 15F(h)(3) (regarding duty to verify counterparty status as ECP, required pre-trade disclosures and ongoing daily mark disclosures)); Section 15F(h)(1)(A) (requiring SBS Dealers and Major SBS Participants to comply with standards as may be prescribed by the Commission regarding fraud); Section 15F(h)(1)(B) (requiring SBS Dealers and Major SBS Participants to comply with standards as may be prescribed by the Commission regarding diligent supervision of the business of the SBS Dealer or Major SBS Participant); Section 15F(h)(4)(A) (antifraud provisions applicable to both SBS Dealers and Major SBS Participants); Section 15F(h)(5) (regarding special requirements

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we are adopting rules that would apply equally to SBS Dealers and Major SBS Participants.[159] We think this is important to ensure that counterparties of Major SBS Participants, as well as counterparties of SBS Dealers, receive the protections the rules are intended to provide. For example, to the extent that Major SBS Participants may be better informed about the risks and valuations of security-based swaps due to information asymmetries, disclosures may help inform counterparties concerning the material risks and characteristics of security-based swaps, and material conflicts of interest of Major SBS Participants entering into security-based swaps.[160]

Where, however, a business conduct requirement is not expressly addressed by the Dodd-Frank Act or we read the statute to apply a requirement only to SBS Dealers,[161] the adopted rules generally would not apply to Major SBS Participants.[162] Thus, the obligations under Rules 15Fh–3(e) (know your counterparty), 15Fh–3(f) (recommendations of security-based swaps or trading strategies), 15Fh–4(b) (special obligations when acting as an advisor to a special entity) and 15Fh–6 (pay to play rules) do not apply to a Major SBS Participant. In addition, our rules provide exceptions to Major SBS Participants, as discussed in Section II.G.2.a, from certain disclosure requirements when entering into security-based swaps with an SBS Dealer, another Major SBS Participant, a swap dealer or a swap participant.

In determining whether or not to apply certain requirements to Major SBS Participants, as explained in the Proposing Release, we have considered how the differences between the definitions of SBS Dealer and Major SBS Participant may be relevant in formulating the business conduct standards applicable to these entities. The Dodd-Frank Act and our rules define "security-based swap dealer" in a functional manner, by reference to the way a person holds itself out in the market and the nature of the conduct engaged in by that person, and how the market perceives the person's activities.[163] Unlike the definition of "security-based swap dealer," which focuses on those persons whose function is to serve as the points of connection in those markets, the definition of "major security-based swap participant" focuses on the market impacts and risks associated with an entity's security-based swap positions.[164] Despite the differences in focus, however, the Dodd-Frank Act applies substantially the same statutory standards to SBS Dealers and Major SBS Participants.[165] We explained in the Proposing Release that, in this way, the statute applies comprehensive regulation to entities (*i.e.,* Major SBS Participants) whose security-based swap activities do not cause them to be dealers, but nonetheless could pose a high degree of risk to the U.S. financial system generally.

We are mindful, as noted by a commenter, that there are "different reasons why the Dodd-Frank Act requires additional oversight of each." [166] We have attempted to take into account these differing definitions and regulatory concerns in considering whether the business conduct requirements that we proposed, and that we are adopting, for SBS Dealers should or should not apply to Major SBS Participants as well. Accordingly, as noted, in general, where the Dodd-Frank Act imposes a business conduct requirement on both SBS Dealers and Major SBS Participants, the rules will apply equally to SBS Dealers and Major SBS Participants, and where a business conduct requirement is not expressly addressed by the Dodd-Frank Act, the rules generally will not apply to Major SBS Participants. We believe this approach addresses the concern of the commenter who argued that the determining factor should be the conduct in which a Major SBS Participant is likely to be engaged.[167]

The external business conduct requirements promulgated under Section 15F(h) are intended to provide certain protections for counterparties, and we believe the rules we are adopting today appropriately apply those requirements to SBS Dealers and Major SBS Participants so that counterparties receive the benefit of those protections. At the same time, mindful of the different role to be played by Major SBS Participants (which, by definition, are not SBS Dealers), we have not sought to impose the full range of business conduct requirements on Major SBS Participants. We note that our approach in this regard largely mirrors that of the CFTC, under whose rules Swap Dealers and Major Swap Participants have operated for some time. We believe that this consistency will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.

We proposed and are adopting limited exceptions (as discussed in connection with the applicable rules) from the disclosure requirements in Rules 15Fh–3(b), 15Fh–3(c) and 15Fh–3(d) for transactions with an SBS Entity or a Swap Entity.[168] We are not, however, adopting the suggestion that we broaden the exceptions to permit other types of counterparties to opt out of the disclosures and other protections provided under the rules when entering into a transaction with a Major SBS Participant. As noted above, the external business conduct requirements promulgated under Section 15F(h) are intended to provide certain protections for counterparties, and we believe the rules we are adopting today appropriately tailor those requirements so that counterparties receive the benefit of those protections.

D. Reliance on Representations

1. Proposal

The Proposing Release solicited input on whether the rules adopted by the Commission should include a standard addressing the circumstances in which an SBS Entity may rely on representations to establish compliance with the business conduct rules.[169] We sought comment on two alternative approaches.[170] One approach would permit an SBS Entity to rely on a representation from a counterparty

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for SBS Dealers and Major SBS Participants that enter into a security-based swap with a special entity); and Section 15F(k) (imposing CCO obligations).

[159] *See* Rules 15Fh–3(a) (verification of counterparty status), 15Fh–3(b) (pre-trade disclosures), 15Fh–3(c) (daily mark), 15Fh–3(h) (supervision), 15Fh–5 (special requirements for SBS Entities acting as counterparties to special entities) and 15Fk–1 (CCO requirements).

[160] *See* discussion *infra* in Section VI.B.

[161] *See* Section II.H.2 (regarding application of "act as an advisor" obligations under Rule 15Fh–4(b) to SBS Dealers but not Major SBS Participants).

[162] As noted in the Proposing Release, there are exceptions to this principle. Because an SBS Entity must comply with the requirements of Rule 15Fh–5 if it is acting as a counterparty to a special entity, the obligation to verify special entity status under Rule 15Fh–3(a)(2) applies to all SBS Entities. *See* Section II.G.1. In addition, Section 3C(g)(5) of the Exchange Act creates certain rights with respect to clearing for counterparties entering into security-based swaps with SBS Entities but does not require disclosure. As discussed in Section II.G.2.f, *infra,* Rule 15Fh–3(d) would require all SBS Entities to disclose to a counterparty certain information relating to these clearing rights.

[163] *See* Exchange Act Section 3(a)(71), 15 U.S.C. 78c(a)(71), and Rule 3a–71, 17 CFR 240.3a71.

[164] *See* Exchange Act Section 3(a)(67), 15 U.S.C. 78c(a)(67), and Rule 3a–67, 17 CFR 240.3a67.

[165] In particular, under Section 15F of the Exchange Act, SBS Dealers and Major SBS Participants generally are subject to the same types of margin, capital, business conduct and certain other requirements, unless an exclusion applies. *See* 15 U.S.C. 78o–10.

[166] *See* MFA, *supra* note 5.

[167] *See* CFA, *supra* note 5.

[168] *See* BlackRock, *supra* note 5.

[169] *See* Proposing Release, 76 FR at 42404, *supra* note 3.

[170] *Id.*

unless it knows that the representation is not accurate ("actual knowledge standard").[171] The other would permit an SBS Entity to rely on a representation unless the SBS Entity has information that would cause a reasonable person to question the accuracy of the representation ("reasonable person standard").[172] After the Commission issued its proposed rules, the CFTC in its final rules adopted a "reasonable person standard" that generally permits a Swap Entity to rely on written representations to satisfy its due diligence obligations unless it has information that would cause a reasonable person to question the accuracy of the representation.[173]

2. Comments on the Proposal

Twelve commenters generally addressed the proposed standards for reliance on counterparty representations.[174] With one exception,[175] these comments predate the 2012 adoption of the CFTC rules.

In 2011, seven commenters supported the actual knowledge standard.[176] One asserted its view that the actual knowledge standard would offer greater legal certainty to SBS Entities when making required subjective judgments under the rules (for example, judgments regarding the qualifications of a special entity's independent representative).[177] Another commenter argued that the actual knowledge standard is preferable because the reasonable person standard would require an assessment of what a reasonable person would conclude if such person had the same information as the SBS Entity, which could cause uncertainty and additional cost for market participants.[178]

One commenter, writing after the CFTC rules were adopted, asked the Commission to adopt a "reasonable person standard" that is "consistent with the parallel CFTC EBC Rules," which generally permit a Swap Entity to rely on written representations to satisfy its due diligence obligations unless it has information that would cause a reasonable person to question the accuracy of the representations.[179] Additionally, two other commenters supported the reasonable person standard in 2011.[180] One commenter asserted that the reasonable person standard would help to ensure that SBS Entities are acting on reliable information because of the duty it would impose to verify the accuracy of a representation if the SBS Entity had some reason to question it.[181] The commenter also argued that the reasonable person standard would be easier to monitor and enforce because it would be objective rather than subjective.[182]

Some commenters suggested that the Commission require detailed representations.[183] One commenter asked the Commission to clarify that, for purposes of "red flags," the knowledge test should apply only to individuals with knowledge of the security-based swap transaction; information that may be available to other parts of the SBS Entity organization should not be imputed to those individuals.[184] Another commenter requested that the Commission clarify that any representations made by a special entity or its representative to satisfy the rules do not give any party any additional rights, such as rescission or monetary compensation (*e.g.,* if the representations turn out to be incorrect).[185] Additionally, the commenter asserted that an SBS Dealer should be permitted to rely on a single set of representations made by a special entity at the beginning of a trading relationship, rather than requiring the SBS Dealer to obtain a new representation with each transaction, if the special entity represents that it will notify the SBS Dealer when the representations become inaccurate.[186]

More generally, another commenter recommended allowing representations to be contained in counterparty relationship documentation if agreed to by the counterparties, and requiring counterparties to undertake to update such representations with any material changes.[187] The commenter also suggested that an SBS Entity that is also registered with the CFTC as a Swap Entity should be permitted to rely on a counterparty's written representations with respect to the CFTC's business conduct rules to satisfy its due diligence requirements under the Commission's business conduct rules provided that the SBS Entity provides notice of such reliance to the counterparty and the counterparty does not object.[188] The commenter argued that this would speed implementation and lower costs without reducing counterparty protections.[189] Finally, the commenter recommended including both a general reliance on representations provision and also specific reliance on representations safe harbors in the individual rules that specify what representations the SBS Entity should obtain to satisfy the safe harbor.[190]

3. Response to Comments and Final Rule

The Commission is adopting new Rule 15Fh–1(b), which provides that an SBS Entity may rely on written representations to satisfy its due diligence requirements under the business conduct rules unless it has information that would cause a reasonable person to question the accuracy of the representation. Under this standard, if an SBS Entity has in its possession information that would cause a reasonable person to question the accuracy of the representation, it will need to make further reasonable inquiry to verify the accuracy of the representation.[191]

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[171] *Id.*

[172] *Id.*

[173] *See* CFTC Adopting Release, 77 FR at 9749, *supra* note 21.

[174] *See* CCMR, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; ABA Committees, *supra* note 5; NABL, *supra* note 5; Better Markets (August 2011), *supra* note 5; AFSCME, *supra* note 5; CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[175] *See* SIFMA (August 2015), *supra* note 5 (asking the Commission to adopt a reasonable person standard consistent with the standard under the parallel CFTC rules).

[176] *See* FIA/ISDA/SIFMA, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; ABA Committees, *supra* note 5; NABL, *supra* note 5.

[177] *See* FIA/ISDA/SIFMA, *supra* note 5.

[178] *See* NABL, *supra* note 5.

[179] *See* SIFMA (August 2015), *supra* note 5.

[180] *See* Better Markets (August 2011), *supra* note 5; CCMR, *supra* note 5. *See also* CFA, *supra* note 5 (opposing both proposed standards but noting a preference for the reasonable person standard over the actual knowledge standard).

[181] *See* Better Markets (August 2011), *supra* note 5.

[182] *Id.*

[183] *See* AFSCME, *supra* note 5 (recommending requiring written representations that are "sufficiently detailed and informative to permit reliance," and requiring SBS Entities to have a reasonable basis for believing the representations to be true); CFA, *supra* note 5 (recommending requiring that the written representations be sufficiently detailed to allow such an assessment).

[184] *See* FIA/ISDA/SIFMA, *supra* note 5.

[185] *See* ABC, *supra* note 5.

[186] *Id.*

[187] *See* SIFMA (August 2015), *supra* note 5.

[188] *Id.* In a subsequent letter, the commenter explained that there is a multilateral protocol that has been adopted by most market participants as a means of complying with the CFTC rules. *See* SIFMA (November 2015), *supra* note 5. The commenter noted that the representations contained in this protocol only expressly address market participants' trading in swaps, but asserted that "the factual matters addressed by those representations typically do not vary as between trading in swaps and trading in [security-based swaps]. As a result, requiring SBS Entities to obtain separate representations specifically addressing [security-based swaps] would impose additional costs with few, if any, additional benefits." *Id.*

[189] SIFMA (November 2015), *supra* note 5.

[190] *Id.*

[191] *See* Proposing Release, 76 FR at 42404, *supra* note 3. As described *infra* in Section II.G.0, Rule 15Fh–3(e) will require an SBS Dealer to have policies and procedures reasonably designed to

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We understand that this is a market in which parties rely heavily on representations both with respect to relationship documentation and the transactions themselves. While both standards we proposed for comment could be workable in this context, we recognize that neither provides the absolute certainty sought by some commenters. As we explained in the Proposing Release, under either approach an SBS Entity could not ignore information in its possession as a result of which the SBS Entity would know that a representation is inaccurate.[192] Under an "actual knowledge" standard, however, an SBS Entity can rely on a representation unless it knows that the representation is inaccurate. This alternative could allow SBS Entities to rely on questionable representations insofar as they do not have actual knowledge that the representation is inaccurate, even if they have information that would cause reasonable persons to question their accuracy. As a result, this alternative could potentially reduce the benefits of the verification of status, know your counterparty, suitability and special entity requirements and result in weaker protections for counterparties to SBS Entities. In contrast, the "reasonable person" standard under the rule as adopted should help ensure that SBS Entities do not disregard facts that call into question the validity of the representation.[193]

Further, this standard also is consistent with the standard adopted by the CFTC under which a Swap Entity cannot rely on a representation if the Swap Entity has information that would cause a reasonable person to question the accuracy of the representation.[194] This consistency will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.

The rule as adopted would permit an SBS Entity to reasonably rely on the representations of a counterparty or its representative to satisfy its due diligence obligations under the business conduct rules, including Rules 15Fh–2(a) and (d), 15Fh–3(a), (e) and (f), 15Fh–4 and 15Fh–5. We are not requiring a specified level of detail for these representations but note that they should be detailed enough to permit the SBS Entity to form a reasonable basis for believing that the applicable requirement is satisfied.[195]

Nothing in our rules would prohibit an arrangement under which the parties agree that representations will be provided in counterparty relationship documentation, and that they will update such representations with any material changes, as suggested by commenters.[196]

We are not accepting the commenter's suggestion that we provide that in every instance an SBS Entity that is also registered with the CFTC as a Swap Entity will be permitted to rely on a counterparty's pre-existing written representations with respect to the CFTC's business conduct rules to satisfy its due diligence requirements under the Commission's business conduct rules, provided that the SBS Entity provides notice of such reliance to the counterparty and the counterparty does not object.[197] Rule 15Fh–1(b) as adopted sets out the standard pursuant to which an SBS Entity can rely on representations to satisfy its due diligence obligations, and does not speak to the process the SBS Entity will need to undertake to meet the standard. The question of whether reliance on the representations that had been obtained with respect to the CFTC business conduct rules, including the process by which the SBS Entity makes that determination, would satisfy an SBS Entity's obligations under our business conduct rules will depend on the facts and circumstances of the particular matter.[198]

We are not adopting the suggestion of one commenter that "the knowledge test should be applied only to individuals with knowledge of the SBS transaction." [199] In some instances it may be appropriate to look only to the knowledge of persons involved in a security-based swap transaction for purposes of determining whether an SBS Entity reasonably relied on representations. However, the determination whether to impute to the individuals that are involved in a securities-based swap transaction knowledge that may be available in other parts of the SBS Entity will depend on the facts and circumstances of the particular matter. At a minimum, an SBS Entity seeking to rely on representations cannot ignore information that would cause a reasonable person to question the accuracy of those representations.

E. Policies and Procedures Alternative

1. Proposal

The Commission solicited comment on whether an SBS Entity should be deemed to have complied with a requirement under the proposed rules if it has: (1) Established and maintained written policies and procedures, and a documented system for applying those policies and procedures, that are reasonably designed to achieve compliance with the requirement; and (2) reasonably discharged the duties and obligations required by the written policies and procedures and documented system, and did not have a reasonable basis to believe that the written policies and procedures and documented system were not being followed.[200]

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obtain and retain certain essential facts regarding a known counterparty. As a result, information in the SBS Entity's possession will include information gathered by an SBS Dealer through compliance with the "know your counterparty" provisions of Rule 15Fh–3(e), as well as any other information the SBS Entity has acquired through its interactions with the counterparty, including other representations obtained from the counterparty by the SBS Entity.

[192] *See* Proposing Release, 76 FR at 42404, *supra* note 3.

[193] *Cf.* Exchange Act Rule 3a71–3(4) (permitting reliance on a counterparty representation unless the party seeking to rely on the representation "knows or has reason to know that the representation is not accurate; . . . a person would have reason to know that the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate"). *See also* Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Final Rule; Republication, Exchange Act Release No. 72472 (Jun. 25, 2014), 79 FR 47277, 47313 (Aug. 12, 2014 (republication)) ("Cross-Border Adopting Release") (noting that "this 'known or have reason to know' standard should help ensure that potential [SBS Entities] do not disregard facts that call into question the validity of the representation").

[194] *See* CFTC Adopting Release, 77 FR at 9749, *supra* note 21.

[195] *See* AFSCME, *supra* note 5 (recommending requiring written representations that are "sufficiently detailed and informative to permit reliance," and requiring SBS Entities to have a reasonable basis for believing the representations to be true); CFA, *supra* note 5 (recommending requiring that the written representations be sufficiently detailed to allow such an assessment).

[196] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[197] *Id.* In a subsequent letter, the commenter explained that there is a multilateral protocol that has been adopted by most market participants as a means of complying with the CFTC rules. *See* SIFMA (November 2015), *supra* note 5. The commenter noted that the representations contained in this protocol only expressly address market participants' trading in swaps, but asserted that "the factual matters addressed by those representations typically do not vary as between trading in swaps and trading in [security-based swaps]. As a result, requiring SBS Entities to obtain separate representations specifically addressing [security-based swaps] would impose additional costs with few, if any, additional benefits." *Id.*

[198] *See* SIFMA (August 2015), *supra* note 5; SIFMA (November 2015), *supra* note 5.

[199] *See* FIA/ISDA/SIFMA, *supra* note 5 (arguing that information that may be available to other parts of the SBS Entity organization should not be imputed to those individuals involved in the SBS transaction).

[200] *See* Proposing Release, 76 FR at 42402, *supra* note 3.

2. Comments on the Proposal

One commenter addressed the policies and procedures alternative.[201] The commenter opposed the alternative, arguing that it would reward the process of achieving compliance more than actually achieving compliance.[202] However, the commenter asserted that SBS Entities should be required to establish, maintain, document and enforce appropriate policies and procedures, and that the Commission should take them into account when determining the sanctions for violations.[203] The commenter argued that the requirement regarding policies and procedures should supplement the requirements or prohibitions in the rules, not supplant them.[204]

3. Response to Comments and Final Rule

After taking into consideration the comment, the Commission is not adopting a general policies and procedures safe harbor. The Commission acknowledges the importance of policies and procedures as a tool to achieving compliance with applicable regulatory and other requirements but agrees with the commenter that a general policies and procedures safe harbor could have the unintended effect of rewarding the process towards achieving compliance more than the result of actually achieving compliance.[205]

As discussed more fully herein, Rule 15Fh–3(h) requires that an SBS Entity establish, maintain and enforce written policies and procedures that are reasonably designed to prevent violations of applicable securities laws, and rules and regulations thereunder. Rule 15Fh–3(h) also provides an affirmative defense to a charge of failure to supervise diligently based, in part, on the establishment and maintenance of these policies and procedures, where the entity has reasonably discharged the duties and obligations required by the written policies and procedures and documented system, and did not have a reasonable basis to believe that the written policies and procedures and documented system were not being followed. In addition, consistent with the approach of the CFTC, we are providing targeted representations-based safe harbors,[206] which should result in efficiencies for entities that have already established infrastructure to comply with the CFTC rules.

F. Definitions

1. Proposed Rule

Proposed Rules 15Fh–2(a), (c), (e) and (f), which would define "act as an advisor to a special entity," "independent representative of a special entity," "special entity," and "subject to a statutory disqualification," respectively are discussed in Section II.H below in the context of the special entity requirements.

Proposed Rule 15Fh–2(b) would define "eligible contract participant" to mean any person defined in Section 3(a)(66) of the Exchange Act.

Proposed Rule 15Fh–2(d) would provide that "security-based swap dealer or major security-based swap participant" would include, where relevant, an associated person of the SBS Dealer or Major SBS Participant.

2. Comments on the Proposed Rule

a. Definitions Relating to the Rules Applicable to Dealings With Special Entities

Comments on paragraphs (a), (c), (e) and (f) of proposed Rule 15Fh–2 defining "act as an advisor," "independent representative of a special entity," "special entity" and "subject to a statutory disqualification," respectively are addressed below in Section II.H.

b. Eligible Contract Participant

One commenter addressed proposed Rule 15Fh–2(b) defining "eligible contract participant." [207] The commenter pointed out an error in the cross-reference in the rule to the Exchange Act definition and recommended adding a reference to applicable rules and interpretations of the Commission and the CFTC.[208]

c. SBS Dealer or Major SBS Participant

Three commenters addressed proposed Rule 15Fh–2(d) defining SBS Dealer or Major SBS Participant.[209] Two commenters suggested that the Commission adopt a broader definition that would apply the business conduct rules to any person acting on behalf of the SBS Entity, including an associated person, consistent with the CFTC business conduct rules.[210] One commenter asserted that this would prevent SBS Entities from "evad[ing] the business conduct rules by doing through third parties what they would not be permitted to do directly." [211] The commenter also discouraged the Commission from seeking to identify all of the requirements that would apply to an associated person of an SBS Entity, suggesting that the rules should apply in any circumstance where an SBS Entity acts through or by means of an associated person or other party.[212]

A third commenter recommended that the Commission clarify that associated persons of an SBS Entity should only be directly responsible for complying with the disclosure rules and rules involving interactions with counterparties, and should not be responsible for complying with internal business conduct standards, such as the rules relating to supervision and requiring designation of a CCO.[213] The commenter also suggested that the Commission define "associated person" as "an associated person of an [SBS Dealer] or [Major SBS Participant] through whom the [SBS Dealer] or [Major SBS Participant] acts." [214]

3. Response to Comments and Final Rule

The Commission is moving the definition of "independent representative of a special entity" from Rule 15Fh–2 to Rule 15Fh–5 and accordingly, re-designating paragraphs (d) through (f) of Rule 15Fh–2 as paragraphs (c) through (e). The definition of "independent representative of a special entity" and paragraphs (a), (d) and (e) of Rule 15Fh–2 (defining "act as an advisor," "special entity" and "subject to a statutory disqualification," respectively) are addressed below in Section II.H.

The Commission is adopting Rule 15Fh–2(b) with two modifications. In response to a suggestion from a commenter,[215] the Commission is correcting a typographical error in the cross-reference to the Exchange Act definition of "eligible contract participant" in the proposed rule. The proposed rule referenced "Section 3(a)(66)" of the Exchange Act, but should have referenced Section 3(a)(65) of the Exchange Act, which defines an eligible contract participant. Section 3(a)(65) of the Exchange Act, in turn, provides that the term eligible contract participant "has the same meaning as in section 1a of the Commodity Exchange Act." We have also revised the definition in response to the same commenter's request that we add a reference to applicable rules and interpretations of the Commission and the CFTC to incorporate the joint SEC–CFTC rulemaking adopted in May 2012.[216] In this regard, we note that the Commission and the CFTC jointly further defined the term eligible contract participant by adopting rules and regulations under the Commodity Exchange Act.[217] Thus, as adopted, the definition of "eligible contract participant" in Rule 15Fh-2(b) refers to: "any person as defined in Section 3(a)(65) of the Act and the rules and regulations thereunder and in Section 1a of the Commodity Exchange Act and the rules and regulations thereunder."

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[201] *See* CFA, *supra* note 5.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See* CFA, *supra* note 5.

[206] *See, e.g.,* Rule 15Fh–3(f)(3), discussed in Section II.G.3, *infra,* under which an SBS Dealer can generally satisfy its obligations by obtaining representations with respect to certain suitability requirements, and Rule 15Fh–5(b), discussed in Section II.H.6, *infra,* under which an SBS Entity can generally satisfy its obligations with respect to having a reasonable basis to believe that a special entity counterparty has a qualified independent representative.

[207] *See* SIFMA (August 2015), *supra* note 5.

[208] *Id.*

[209] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[210] *See* CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[211] *See* CFA, *supra* note 5.

[212] *Id.*

[213] *See* FIA/ISDA/SIFMA, *supra* note 5.

[214] *Id.*

[215] *See* SIFMA (August 2015), *supra* note 5.

After considering the comments, the Commission is adopting Rule 15Fh–2(d) as proposed, re-designated as Rule 15Fh–2(c). The statute defines the term "associated person of a security-based swap dealer or major security-based swap participant" to include "any person directly or indirectly controlling, controlled by, or under common control with" an SBS Dealer or Major SBS Participant.[218] While the SBS Entity remains ultimately responsible for compliance with the business conduct standards, to the extent that an SBS Entity acts through, or by means of, an associated person of that SBS Entity, the associated person must comply as well with the applicable business conduct standards.

The Commission declines to modify the definition, as requested by some commenters, to apply to persons acting on behalf of the SBS Entity.[219] We believe it unnecessary to expand the definition because, as noted above, the SBS Entity remains ultimately responsible for compliance with the business conduct standards, whether the SBS Entity is acting through, or by means of, an associated person or other person.

In response to the commenter that raised concerns that associated persons should not be responsible for complying with "internal" business conduct standards,[220] the Commission notes that Rule 15Fh–2(c) provides that the definition of an SBS Entity includes associated persons of the SBS Entity "where relevant." Certain rules, including the so-called "internal" business conduct rules (*e.g.*, Rule 15Fh–3(h) (supervision) and Rule 15Fk–1 (designation of CCO)) may apply to some but not all associated persons of an SBS Entity, and the registrant remains ultimately responsible for compliance with all of the business conduct rules that are the subject of this rulemaking.

G. Business Conduct Requirements

1. Counterparty Status

a. Proposed Rule

Section 15F(h)(3)(A) of the Exchange Act directs that business conduct requirements adopted by the Commission shall establish a duty for an SBS Entity to verify that any counterparty meets the eligibility standards for an ECP.[221]

Proposed Rule 15Fh–3(a)(1) would require an SBS Entity to verify that a counterparty whose identity is known to an SBS Entity prior to the execution of the transaction meets the eligibility standards for an ECP, before entering into a security-based swap with that counterparty other than on a registered national securities exchange or SEF.[222] Proposed Rule 15Fh–3(a)(2) would require an SBS Entity to verify whether a counterparty whose identity is known to the SBS Entity prior to the execution of the transaction is a special entity before entering into a security-based swap with that counterparty, no matter where the transaction is executed.[223]

b. Comments on the Proposed Rule

Three commenters addressed proposed Rule 15Fh–3(a).[224] One opposed limiting the application of the rule to known counterparties, noting that this would invite SBS Entities to promote anonymous off-exchange transactions that would allow them to avoid obligations otherwise owed to special entities.[225] The commenter asserted that the only exemption from the verification requirement should be for transactions on a registered exchange or SEF, and that for such transactions, if the SBS Entity knows the identity of the counterparty prior to the transaction and has reason to believe it may not be an ECP, the SBS Entity should be required to undertake an additional inquiry to verify the counterparty's status.[226] The commenter also recommended that verification take place before the SBS Entity offers to enter into a transaction, rather than before execution.[227]

Two commenters recommended that the exception for transactions on a registered exchange or SEF be broadened to apply to the verification of special entity status in addition to the verification of ECP status.[228] One commenter also recommended expanding the exception to include exempt SEFs, such as a foreign SEF that the Commission determines to be subject to a comparable home country regime.[229] Additionally, as part of a series of recommendations to harmonize with the CFTC's treatment of employee benefit plans defined in Section 3 of ERISA, the commenter suggested requiring an SBS Entity to verify whether a counterparty is eligible to elect to be a special entity, and if so, to notify such counterparty.[230]

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[216] Section 712(d)(1)(A) of the Dodd-Frank Act provides, among other things, that the CFTC and the Commission, in consultation with the Board of Governors, shall further define the term "eligible contract participant." Public Law 111–203, 124 Stat. 1376 (2010). Moreover, Section 712(d)(4) provides that any interpretation of, or guidance by either Commission regarding, a provision of Title VII of the Dodd Frank Act shall be effective only if issued jointly by the CFTC and the Commission, after consultation with the Board of Governors, if this title requires the Commissions to issue joint regulations to implement the provision. *Id.*

[217] *See* Definitions Adopting Release, *supra* note 115.

[218] Section 3(a)(70)(A)(ii) of the Exchange Act, 15 U.S.C. 78c(a)(70)(A)(ii).

[219] *See* CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[220] *See* FIA/ISDA/SIFMA, *supra* note 5.

[221] 15 U.S.C. 78o–10(h)(3)(A).

[222] Proposed Rule 15Fh–3(a)(1). *See* Section 6(l) of the Exchange Act (making it unlawful to effect a security-based swap transaction with or for a person that is not an ECP unless such transaction is effected on a registered national securities exchange). *See also* Section 5(e) of the Securities Act of 1933, 15 U.S.C. 77e(e)) ("unless a registration statement meeting the requirements of section 10(a) [of the Securities Act] is in effect as to a security-based swap, it shall be unlawful for any person . . . to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant"). *See also* Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) ("SEF Registration Proposing Release") (proposed Rule 809 would limit SEF participation to registered SBS Dealers, Major SBS Participants, brokers and ECPs).

[223] Proposed Rule 15Fh–3(a)(2). *See generally* Section 15F(h)(1)(D) of the Exchange Act, 15 U.S.C. 78o–10(h)(1)(D) (authorizing the Commission to prescribe business conduct standards that relate to "such other matters as the Commission determines to be appropriate").

[224] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[225] *See* CFA, *supra* note 5.

[226] *Id.* The commenter also recommended that the Commission conform to the CFTC's then-pending proposal, which would have required counterparty status verification in any transaction other than anonymous transactions on a swap execution facility. We note, however, that the CFTC subsequently adopted a rule that clarified that the exemption from verification applies to all transactions on a designated contract market ("DCM") and to anonymous transactions on a swap execution facility. *See* CFTC Adopting Release, 77 FR at 9757, *supra* note 21.

[227] *See* CFA, *supra* note 5.

[228] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[229] SIFMA (August 2015), *supra* note 5.

The other commenter also recommended further narrowing the application of the rule by excluding transactions in which the identity of the counterparty is known just prior to execution, arguing that an SBS Entity would have insufficient time to exchange representations with the counterparty or otherwise verify the counterparty's status in those situations.[231] Alternatively, the commenter requested that the Commission require SEFs to adopt rules that would permit verification of the counterparty's status.[232] The commenter also opposed establishing specific documentation requirements regarding counterparty status, asserting that it would not allow for flexible risk management and investment decisions through private contractual negotiation.[233]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(a) with certain modifications.

Rule 15Fh–3(a)(1), as adopted, requires an SBS Entity to verify the ECP status of a counterparty before entering into a security-based swap with that counterparty other than a transaction executed on a registered national securities exchange. We are not adopting the further provision of the proposed rule that would have limited the application of the verification requirement to a counterparty "whose identity is known to the SBS Entity prior to the execution of the transaction." We also are not adopting the provision of the proposed rule that would have provided that the verification requirement does not apply to transactions executed on a SEF. These changes reflect the Commission's further consideration of the regulatory framework provided by the Dodd-Frank Act.

In particular, Section 6(l) of the Exchange Act makes it unlawful to effect a transaction in a security-based swap with or for a person that is not an ECP, unless the transaction is effected on a registered national securities exchange.[234] Section 6(l) of the Exchange Act does not provide an exception for transactions effected on SEFs, or for transactions where the identity of a counterparty is not known to the SBS Entity prior to the execution of the transaction. Thus, upon further consideration of the proposed rule in the context of the statute, we are not providing an exception for transactions executed other than on a registered national securities exchange, and we are not limiting the requirement to known counterparties because Section 6(l) of the Exchange Act does not contain a similar exception or limitation, and we do not wish to suggest to SBS Entities that Section 6(l) is similarly limited. In this regard, we note that, even with these modifications, the scope of Section 6(l) of the Exchange Act ("unlawful to effect a transaction in a security-based swap") is broader than the activity covered by Rule 15Fh–3(a)(1) ("before entering into a security-based swap"), and that SBS Entities, and other market participants, have an independent obligation under Section 6(l) for any action covered by that section.[235]

As noted in the Proposing Release, an SBS Entity that has complied with the requirements of Rule 15Fh–3(a)(1) concerning a counterparty's eligibility to enter into a particular security-based swap fulfills its obligations under the rule for that security-based swap, even if the counterparty subsequently ceases to meet the eligibility standards for an ECP during the term of that security-based swap.[236] However, an SBS Entity will need to verify the counterparty's status for any subsequent action covered by Rule 15Fh–3(a)(1), (which it could do by relying on written representations from the counterparty, as described above). An SBS Entity could satisfy this obligation by relying on a representation in a master or other agreement that is renewed or "brought down" as of the date of the subsequent action covered by 15Fh–3(a)(1). In this manner, counterparties will be able to make representations about their status at the outset of a relationship, and can undertake to "bring down" that representation for each relevant action involving a security-based swap. In addition, as noted above, market participants have an independent obligation under Section 6(l) of the Exchange Act for any action covered by that section.

Rule 15Fh–3(a)(2), as adopted, requires an SBS Entity to verify whether a counterparty is a special entity before entering into a security-based swap transaction with that counterparty, unless the transaction is executed on a registered or exempt SEF or registered national securities exchange and the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule. The rule as proposed would have limited the verification of special entity status to counterparties whose identity is known to the SBS Entity prior to the execution of the security-based swap transaction. Because the question of special entity status figures most significantly in connection with the application of the special entity rules (Rules 15Fh–4, 15Fh–5 and 15Fh–6), we have modified the special entity verification rule to track the exceptions to those rules.[237] Accordingly, the verification of special entity status requirements will not apply where the transaction is executed on a registered or exempt SEF or registered national securities exchange, and the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule.

An SBS Entity that has complied with the requirements of Rule 15Fh–3(a)(2) concerning verification whether a counterparty is a special entity before entering into a particular security-based swap with that counterparty fulfills its obligations under the rule for that security-based swap.[238] However, an SBS Entity will need to verify the counterparty's status for any subsequent action covered by Rule 15Fh–3(a)(2) (which it could do by relying on written representations from the counterparty, as described above). An SBS Entity could satisfy this obligation by relying on a representation in a master or other agreement that is renewed or "brought down" as of the date of the subsequent action covered by 15Fh–3(a)(2). In this manner, counterparties will be able to make representations about their status at the outset of a relationship, and can undertake to "bring down" that representation for each relevant action involving a security-based swap.

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[230] *Id. See also* discussion in Section III.H.1, *infra.*

[231] FIA/ISDA/SIFMA, *supra* note 5.

[232] *Id.*

[233] *Id.*

[234] *See* Proposing Release, 76 FR at 42403, *supra* note 5. 15 U.S.C. 78f(l) ("[i]t shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a [registered] national securities exchange").

[235] *See also* Section 5(e) of the Securities Act, 15 U.S.C. 77e(e) ("unless a registration statement meeting the requirements of [section 10(a) of the Securities Act] is in effect as to a security-based swap, it shall be unlawful for any person . . . to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant"). This rulemaking does not address and has no applicability with respect to the requirements under the Securities Act applicable to security-based swap transactions.

[236] *See* Proposing Release, 76 FR at 42404, *supra* note 5.

[237] *See* Section II.B.

[238] *See* Proposing Release, 76 FR at 42404, *supra* note 5.

Additionally, the Commission is adding a new paragraph (a)(3), special entity election, which requires an SBS Entity, in verifying the special entity status of a counterparty pursuant to Rule 15Fh–3(a)(2), to verify whether a counterparty is eligible to elect not to be a special entity as provided for in the adopted special entity definition in Rule 15Fh–2(d)(4), and if so, notify such counterparty. This change is intended to provide the greatest protections to the broadest categories of special entities, while still allowing them the flexibility to elect not to avail themselves of special entity protections.[239]

Although the Dodd-Frank Act does not specifically require an SBS Entity to verify whether a counterparty is a special entity or is eligible to elect not to be a special entity, the Commission believes that such verification will help to ensure the proper application of the business conduct rules that apply to SBS Entities dealing with special entities.[240]

The Commission is not revising the rule, as suggested by a commenter,[241] to require that verification of special entity counterparty status take place before an SBS Entity "offers" to enter into a transaction. We agree with the commenter that it is important for an SBS Entity to verify special entity status "as soon as possible . . . to ensure timely compliance with the other obligations that accompany transactions with these entities." As explained in Section II.A, when the rules refer to a "counterparty" of the SBS Entity, the term "counterparty" includes a potential counterparty where compliance with the obligation is required before the SBS Entity and the "counterparty" have actually entered into the security-based swap.

The Commission is not specifying the manner of documentation or procedures required for compliance with Rule 15Fh–3(a).[242] Among other things, an SBS Entity could rely on representations in accordance with Rule 15Fh–1(b). For example, an SBS Entity could verify that a counterparty is an ECP by obtaining a written representation from the counterparty as to specific facts about the counterparty (*e.g.,* that it has $100 million in assets) to conclude that the counterparty is an ECP, unless the SBS Entity has information that would cause a reasonable person to question the accuracy of the representation. Similarly, an SBS Entity could seek to verify that a counterparty is not a special entity by obtaining a written representation from the counterparty that it does not fall within any of the enumerated categories of persons that are "special entities" for purposes of Section 15F of the Exchange Act. The SBS Entity also could seek to obtain a representation in writing from the counterparty if it elects not to be a special entity, as provided for in the special entity definition in Rule 15Fh–2(d)(4). Consistent with Rule 15Fh–1(b), however, an SBS Entity cannot disregard information that would cause a reasonable person to question the accuracy of the representation.

2. Disclosure

Section 15F(h)(3)(B) of the Exchange Act broadly requires that business conduct requirements adopted by the Commission require disclosures by SBS Entities to counterparties of information related to "material risks and characteristics" of the security-based swap, "material incentives or conflicts of interest" that an SBS Entity may have in connection with the security-based swap, and the "daily mark" of a security-based swap.[243]

a. Disclosure Not Required When the Counterparty is an SBS Entity or a Swap Entity

i. Proposed Rules

Section 15F(h)(3)(B) provides that disclosures under that section are not required when the counterparty is "a security-based swap dealer, major security-based swap participant, security-based swap dealer, or major security-based swap participant."[244] As explained in the Proposing Release, the Commission believes that the repetition of the terms "security-based swap dealer and major security-based swap participant" in this Exchange Act provision is a drafting error, and that Congress instead intended an exclusion identical to that found in the Commodity Exchange Act, which provides that these general disclosures are not required when the counterparty is "a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant."[245] Accordingly, proposed Rule 15Fh–3(b) (information about material risks and characteristics, and material incentives or conflicts of interests), proposed Rule 15Fh–3(c) (the daily mark), and proposed Rule 15Fh–3(d) (clearing rights) would not apply whenever the counterparty is an SBS Entity or Swap Entity.

ii. Comments on the Proposal

Two commenters submitted comments on the application of the disclosure requirements when the counterparty is an SBS Entity or Swap Entity.[246] One commenter asserted that the disclosure requirements should apply even when the counterparty is also an SBS Entity.[247] Another commenter agreed with the Commission's interpretation that Congress intended the exclusion to apply to transactions with other SBS Entities and Swap Entities.[248] However, in response to a specific request for comment, the commenter asserted that the Commission should not exempt transactions with other entities (such as banks or broker-dealers) from the disclosure requirements, or otherwise subject them to different disclosure standards, because while more sophisticated banks or brokers may benefit, less sophisticated parties would be left without adequate protections.[249]

Additionally, as discussed in Section II.B, a commenter advocated for adding exceptions to the disclosure requirements in Rules 15Fh–3(b) and (d) to cover security-based swaps that are intended to be cleared and that are either (1) executed on a registered national securities exchange or registered or exempt SEF and required to be cleared pursuant to Section 3C of the Exchange Act, or (2) anonymous.[250] The commenter argued that this would harmonize the scope of the Commission's disclosure requirements with no-action relief provided by the

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[239] As explained in Section II.H.1, we are interpreting the definition of "special entity" to distinguish entities that are "defined in" section 3 of ERISA but not "subject to" regulation under Title I of ERISA. Our rules as adopted would include within the "special entity" definition entities such as church plans and plans maintained solely for the purpose of complying with applicable workmen's compensation laws, unemployment compensation, or disability insurance laws but allow them to elect not to be treated as "special entities."

[240] *See* Section II.H, *infra.*

[241] *See* CFA, *supra* note 5.

[242] *See* Proposing Release, 76 FR at 42403, *supra* note 3. The Commission separately has proposed rules regarding recordkeeping and reporting requirements for SBS Entities that would require an SBS Entity to keep records of its verification. *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25193, 25208 and 25217–25218 (May 2, 2014) ("Recordkeeping Release") (proposed Rules 18a–5(a)(17) and 18a–5(b)(13)).

[243] 15 U.S.C. 78o–10(h)(3)(B).

[244] 15 U.S.C. 78o–10(h)(3)(B).

[245] 7 U.S.C. 6s(h)(3)(B). *See* Proposing Release, 76 FR at 42405, *supra* note 3.

[246] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5.

[247] *See* Better Markets (August 2011), *supra* note 5.

[248] *See* CFA, *supra* note 5.

[249] *Id.*

[250] *See* SIFMA (August 2015), *supra* note 5.

CFTC with respect to its parallel requirements.[251]

iii. Response to Comments and Final Rules

After considering the comments, the Commission is adopting, as proposed, the exceptions from the disclosure requirements under Rule 15Fh–3(b) (information about material risks and characteristics, and material incentives or conflicts of interests), Rule 15Fh–3(c) (the daily mark), and Rule 15Fh–3(d) (clearing rights) for transactions in which the counterparty is an SBS Entity or Swap Entity. We are not adopting the suggestion that disclosure requirements apply even when the counterparty is an SBS Entity or Swap Entity. We believe that an SBS Entity would be well-positioned to negotiate with another SBS Entity, and nothing in our rules precludes an SBS Entity from requesting such disclosures.

In addition, the exceptions under the rules as adopted parallel the exceptions in the analogous CFTC rules. This consistency will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.

For the reasons discussed in Section II.B, we are not providing additional exceptions for transactions that are intended to be cleared.[252]

b. Timing and Manner of Certain Disclosures and Scope of Disclosure Rules

i. Proposed Rules

Proposed Rule 15Fh–3(b) would require that disclosures regarding material risks and characteristics and material incentives or conflicts of interest be made to potential counterparties before entering into a security-based swap, but would not mandate the specific manner in which those disclosures are made as long as they are made "in a manner reasonably designed to allow the counterparty to assess" the information being provided.[253] Proposed Rule 15Fh–3(d) similarly would require that disclosures regarding certain clearing rights be made before entering into a security-based swap, but would not mandate the manner of disclosure. To the extent such disclosures were not otherwise provided to the counterparty in writing prior to entering into a security-based swap, proposed Rules 15Fh–3(b)(3) and 15Fh–3(d)(3) would require an SBS Entity to make a written record of the non-written disclosures made pursuant to proposed Rules 15Fh–3(b) and 15Fh–3(d), respectively, and provide a written version of these disclosures to the counterparty in a timely manner, but in any case no later than the delivery of the trade acknowledgement of the particular transaction.

ii. Comments on Proposed Rules

Timing and Manner of Certain Disclosures

Five commenters addressed the timing and manner of required disclosures.[254] One commenter recommended allowing disclosure requirements to be satisfied by the execution of a master agreement and provision of a trade acknowledgment.[255] Similarly, another commenter urged the Commission to permit all required disclosures to be made upfront at the beginning of a trading relationship, rather than on a transaction-by-transaction basis.[256]

Alternatively, if the Commission requires disclosure beyond the master agreement and trade acknowledgment, the first commenter encouraged the Commission to permit the use of standardized disclosures.[257] The commenter also recommended that the Commission not dictate the timing of required disclosures and permit SBS Entities to make required disclosures in advance, as opposed to immediately prior to the execution of a trade, so as not to interfere with the parties' desired timing.[258] However, the commenter noted that advance disclosure requirements would be infeasible for transactions executed on a SEF or exchange, or where the counterparty is known only immediately prior to or after execution.[259]

In contrast, two commenters advocated for more specific requirements with respect to the timing and manner of disclosure.[260] Both recommended that disclosure be required in writing and at a "reasonably sufficient time" prior to the execution of the transaction to allow counterparties to evaluate the information before deciding whether to enter the transaction.[261] One commenter also asserted that disclosure should be in a clear and intelligible format that permits comparison between derivatives offered by different market participants.[262] The other commenter opposed allowing SBS Entities to satisfy disclosure requirements through entry into a master agreement and provision of a trade acknowledgement, arguing that key information could be lost in the fine print of legal documents.[263] At a minimum, if a master agreement is used, the commenter recommended that the required disclosures regarding material risks and characteristics and material incentives or conflicts of interest be provided in a clearly labeled, separate narrative incorporated into the overall document, and that all key issues be disclosed before the trade is executed and not in a post-trade acknowledgement.[264]

Another commenter also recommended that disclosure regarding material risks and characteristics and material incentives or conflicts of interest be required at a "reasonably sufficient time" prior to the execution of the transaction to harmonize with the CFTC's disclosure requirements.[265] Additionally, as discussed in Section II.B, the commenter advocated for adding exceptions to the disclosure requirements in Rules 15Fh–3(b) and (d) to cover security-based swaps that are intended to be cleared and that are either: (1) Executed on a registered national securities exchange or registered or exempt SEF and required to be cleared pursuant to Section 3C of the Exchange Act, or (2) anonymous.[266]

Written Records of Non-Written Disclosure

One commenter addressed the written record requirements in proposed Rules 15Fh–3(b)(3) and 15Fh–3(d)(3).[267] The commenter opposed permitting SBS Entities to make required disclosures orally, asserting that oral disclosure fails to promote pre-trade transparency and makes enforcement more difficult, and that SBS Entities may minimize disclosure of conflicts of interest when making them orally.[268] The commenter also argued that the Commission's approach to permitting oral disclosure "doesn't even have the benefit of saving labor, since the Commission proposes to require after-the-fact written disclosures of any information not made in writing prior to the transaction."[269]

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[251] *Id.*

[252] *Id. See Swaps Intended to Be Cleared,* CFTC Letter No. 13–70 (Nov. 15, 2013), available at *http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-70.pdf.*

[253] Section 15F(h)(3)(B) of the Exchange Act is silent regarding both form and timing of disclosure. *See* 15 U.S.C. 78o–10(h)(3)(B).

[254] *See* ABC, *supra* note 5; CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; Better Markets (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[255] *See* FIA/ISDA/SIFMA, *supra* note 5.

[256] *See* ABC, *supra* note 5.

[257] *See* FIA/ISDA/SIFMA, *supra* note 5.

[258] *Id.*

[259] *Id.*

[260] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5.

[261] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5.

[262] *See* Better Markets (August 2011), *supra* note 5.

[263] *See* CFA, *supra* note 5.

[264] *Id.*

[265] *See* SIFMA (August 2015), *supra* note 5.

[266] *Id.*

[267] *See* CFA, *supra* note 5.

[268] *See* CFA, *supra* note 5.

Scope of Disclosure Rules

If the Commission requires disclosure beyond the master agreement and trade acknowledgment, one commenter encouraged the Commission to exclude from such requirements counterparties that are regulated entities such as banks, broker-dealers, and investment advisers.[270] Two other commenters argued that Major SBS Participants should not be subject to the disclosure requirements because they will be transacting with counterparties at arm's length.[271] Alternatively, one commenter suggested exempting transactions between Major SBS Participants and SBS Dealers from the disclosure requirements, and allowing all other counterparties to opt out of certain disclosure requirements, in particular receiving written records of non-written disclosure.[272] Similarly, another commenter suggested that ECPs should have the option of opting-out of disclosures.[273]

iii. Response to Comments and Final Rules

After considering the comments, the Commission is adopting the rules substantially as proposed, with certain modifications. In response to commenters' concerns, the Commission is requiring that an SBS Entity make the disclosures required by Rule 15Fh–3(b) regarding material risks and characteristics and material incentives or conflicts of interest at a reasonably sufficient time prior to entering into a security-based swap to allow the counterparty to assess the disclosures. This will also be consistent with the CFTC's timing requirement for its parallel disclosures rules, resulting in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.

With respect to the manner of disclosure, we are not adopting the commenters' suggestion that we impose more specific requirements with respect to the timing and manner of disclosure.[274] Instead, the Commission continues to believe it is appropriate to require only that disclosures regarding material risks and characteristics and material incentives or conflicts of interest be made "in a manner reasonably designed to allow the counterparty to assess" the information being provided pursuant to Rule 15Fh–3(b). As noted in the Proposing Release, this provision is intended to require that disclosures be reasonably clear and informative as to the relevant material risks or conflicts that are the subject of the disclosure, and is not intended to impose a requirement that disclosures be tailored to a particular counterparty or to the financial, commercial or other status of that counterparty.[275]

After considering the comments, the Commission is also adopting as proposed the requirements in Rules 15Fh–3(b)(3) and 15Fh–3(d)(3) that an SBS Entity make a written record of any non-written disclosures made pursuant to Rules15Fh–3(b) and 15Fh–3(d), respectively, and provide a written version of these disclosures to the counterparty in a timely manner, but in any case no later than the delivery of the trade acknowledgement[276] of the particular transaction. As noted in the Proposing Release and suggested by commenters, the Commission understands that security-based swaps generally are executed under master agreements, with much of the transaction-specific disclosure provided over the telephone, in instant messages or in confirmations.[277] The Commission believes that parties should have the flexibility to make disclosures by various means, including master agreements and related documentation, telephone calls, emails, instant messages, and electronic platforms.[278] Similarly, while we acknowledge the commenter's concern that SBS Entities may minimize disclosure of conflicts of interest when making them orally, we are not persuaded that requiring all disclosures be provided in writing prior to the parties' entering into a security-based swap would be necessary to provide protections under the rule as adopted. We further note that Rule 15Fh–3(b)(3), discussed in Section II.G.2.c, separately requires that an SBS Entity provide a written record of non-written disclosures no later than the delivery of the trade acknowledgement of the particular transaction. Accordingly, the Commission anticipates that SBS Entities may elect to make certain required disclosures of material information to their counterparties in a master agreement or other written document accompanying such agreement. While certain forms of disclosure may be highly standardized, certain provisions may need to be tailored to the particular transaction, most notably pricing and other transaction-specific commercial terms. As noted in the Proposing Release, the Commission believes this approach is generally consistent with the use of standardized disclosures suggested by industry groups and commenters.[279]

We do believe, however, that is it is important that the required disclosures be made at a reasonably sufficient time before the execution of the transaction to allow the counterparty to assess the disclosures. While this time may vary depending on the product and the counterparty, we do not believe, as suggested by some commenters, that SBS Entities should be able to rely on trade acknowledgements alone to satisfy certain disclosure requirements.[280] As noted in the Proposing Release, however, SBS Entities could rely on trade acknowledgements to memorialize non-written disclosures they made prior to entering into the proposed transaction.[281]

As discussed in Section II.B above, the Commission is limiting the disclosure requirements in Rules 15Fh–3(b) and (d) to circumstances where the identity of the counterparty is known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule. The disclosure requirements in Rules 15Fh–3(b) and (d) will not apply where the identity of the counterparty is not discovered until after the execution of the transaction, or where the SBS Entity learns the identity of the counterparty with insufficient time to be able to provide the necessary disclosures to satisfy its obligations under the rule without disrupting or delaying the execution of the transaction. Similarly, for the reasons discussed in Section II.A.3.d, we are not providing additional exceptions or "opt-out" rights.

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[269] *Id.*

[270] *See* FIA/ISDA/SIFMA, *supra* note 5.

[271] *See* BlackRock, *supra* note 5; MFA, *supra* note 5.

[272] *See* BlackRock, *supra* note 5.

[273] *See* MFA, *supra* note 5.

[274] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5.

[275] *See* Proposing Release, 76 FR at 42406, *supra* note 3.

[276] *See* Trade Acknowledgement and Verification of Security-Based Swap Transactions, Exchange Act Release No. 63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (proposing Rule 15Fi–1(c)(1), which would require a trade acknowledgement to be provided within 15 minutes of execution for a transaction that has been executed and processed electronically; within 30 minutes of execution for a transaction that is not electronically executed, but that will be processed electronically; and within 24 hours of execution for a transaction that the SBS Entity cannot process electronically).

[277] *See* Proposing Release, 76 FR at 42406, *supra* note 3; FIA/ISDA/SIFMA, *supra* note 5.

[278] When SBS Entities rely on electronic media, their counterparties generally should have the capability to effectively access all of the information required by Rule 15Fh–3(b)(3) in a format that is understandable but not unduly burdensome for the counterparty. *See generally* Use of Electronic Media by Broker-Dealers, Transfer Agents and Investment Advisers for Delivery of Electronic Information, Securities Act Release No. 7288 (May 9, 1996), 61 FR 24644 (May 15, 1996). *See also* Use of Electronic Media, Exchange Act Release No. 42728 (Apr. 28, 2000), 65 FR 25843 (May 4, 2000).

[279] *See* Proposing Release, 76 FR at 42406, *supra* note 3.

[280] *See* FIA/ISDA/SIFMA, *supra* note 5.

[281] *See* Proposing Release, 76 FR at 42406, *supra* note 3.

Finally, we are not adopting the suggestion of one commenter that the Commission exclude from the disclosure requirements transactions with counterparties that are regulated entities such as banks, broker-dealers, and investment advisers.[282] Because information asymmetries exist in a market for opaque and complex products, even for regulated entities, such disclosures may help inform counterparties concerning the valuations and material risks and characteristics of security-based swaps in the sometimes rapidly changing market environment.[283] In this regard, the external business conduct requirements promulgated under Section 15F(h) are intended to provide certain protections for counterparties, including information regarding the material risks and characteristics of the security-based swap, any material incentives or conflicts of interest that the SBS Entity may have, and the daily mark of the security-based swap. We believe the rules we are adopting today appropriately apply those requirements so that counterparties receive the benefit of those protections, and so are not providing counterparty exclusions beyond the exception for transactions with SBS Entities and Swap Entities discussed in Section II.G.2.a, *infra*.

c. Material Risks and Characteristics of the Security-Based Swap

i. Proposed Rule

Proposed Rule 15Fh–3(b)(1) would require an SBS Entity to disclose the material risks and characteristics of the particular security-based swap, including, but not limited to, the material factors that influence the day-to-day changes in valuation, the factors or events that might lead to significant losses, the sensitivities of the security-based swap to those factors and conditions, and the approximate magnitude of the gains or losses the security-based swap would experience under specified circumstances. In the Proposing Release, the Commission also solicited comment regarding whether SBS Entities should be specifically required to provide scenario analysis disclosure.[284]

ii. Comments on the Proposed Rule

General

Seven commenters addressed the disclosure of material risks and characteristics of security-based swaps.[285] One commenter expressed support for the proposed disclosure requirements, agreeing that the disclosure should include any information for which there is a substantial likelihood that a reasonable investor would consider the information to be important in making an investment decision.[286]

Two commenters argued that the Commission should adopt different or modified disclosure requirements.[287] One commenter requested that the Commission clarify in the rule that: (1) The rule only requires disclosure about the material risks and characteristics of the security-based swap itself and not with respect to the underlying reference security or index, and (2) the rule does not require disclosure in relation to any particular counterparty.[288] The commenter also asked the Commission to eliminate the proposed requirement that risk disclosures set forth the approximate magnitude of the gains or losses the security-based swap will experience under specified circumstances because this is the functional equivalent of a requirement to provide a scenario analysis, which the commenter does not support (discussed below).[289] Additionally, the commenter noted its view that the Commission should not require an SBS Entity to disclose the absence of certain material provisions typically contained in master agreements for security-based swap transactions because master agreements differ and what is "typical" is not clear.[290] A second commenter requested a clarification that only material information is required to be disclosed.[291]

Three commenters argued for additional or modified requirements.[292] One asserted that the proposed disclosure obligations are too limited in terms of scope, form, and content.[293] The commenter suggested that the disclosure provisions should require "more complete, timely, and intelligible disclosure of all the risks, costs, and other material information relating to [security-based swap] transactions," including disaggregated prices and risks, listed hedge equivalents, scenario analysis (discussed below), and embedded financing costs.[294] Similarly, another commenter requested clarification regarding what material risks and characteristics must be disclosed, arguing that the disclosure should include liquidity risks, the details of (and separate prices for) the standardized component parts of any customized security-based swap, any features of the security-based swap that could disadvantage the counterparty (such as differences in interest rates paid versus those received), and where credit arrangements are built into security-based swaps through forbearance of collateral posting, the embedded credit and its price.[295] A third commenter also suggested that the Commission clarify what material risks and characteristics must be disclosed, proposing that SBS Entities be required to disclose any material risk related to the source of a security-based swap's assets and any negative view by the SBS Entity itself of the assets' riskiness.[296] The commenter also recommended that SBS Entities be required to disclose the material risks and characteristics not just of the security-based swap itself, but also of any reference securities, indices, or other assets, noting that this disclosure would be particularly important when the security-based swap references unique pools of assets arranged by the SBS Entity.[297]

Another commenter, writing after the CFTC adopted its final rules, recommended that the Commission harmonize with the CFTC's requirement to disclose material risks and characteristics.[298] Specifically, the commenter requested that, like the CFTC, the Commission describe the material risks and characteristics to be disclosed as including "market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks," and "the material economic terms of the security-based swap, the terms relating to the operation of the security-based swap, and the rights and obligations of the parties during the term of the security-based swap."[299] The commenter argued that harmonization with the CFTC would help support the continued development of standard disclosures, reducing compliance costs and preventing undue delays in execution, and would reduce the likelihood of inconsistent disclosures for similar products and resulting counterparty confusion.[300]

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[282] *See* FIA/ISDA/SIFMA, *supra* note 5.

[283] *See* Section VI.C, *infra*.

[284] *See* Proposing Release, 76 FR at 42409, *supra* note 3.

[285] *See* Barnard, *supra* note 5; Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Levin, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[286] *See* Barnard, *supra* note 5.

[287] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[288] *See* FIA/ISDA/SIFMA, *supra* note 5.

[289] *Id.*

[290] *Id.*

[291] *See* SIFMA (August 2015), *supra* note 5.

[292] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Levin, *supra* note 5.

[293] *See* Better Markets (August 2011), *supra* note 5.

[294] *Id.*

[295] *See* CFA, *supra* note 5.

[296] *See* Levin, *supra* note 5.

[297] *Id.*

[298] *See* SIFMA (August 2015), *supra* note 5.

Scenario Analysis

We sought comment on whether we should require scenario analysis and, if so, what standards should apply. Eight commenters addressed the disclosure of scenario analysis.[301] Four commenters supported requiring scenario analysis disclosure to some degree.[302] Of these commenters, one suggested that the analysis include specific information about the security-based swap's liquidity and volatility.[303] Another recommended only requiring scenario analysis disclosure for "high-risk complex security-based swaps," and suggested that the Commission provide additional clarification or a definition for determining what security-based swaps are high-risk and complex.[304] A third commenter advocated requiring SBS Entities to notify counterparties of their right to receive a scenario analysis and to provide a scenario analysis at the request of a non-SBS Entity counterparty.[305] To reduce the costs associated with providing scenario analyses and to mitigate the disclosure of SBS Entities' proprietary information, the commenter suggested that the Commission permit SBS Entities to delegate the provision of scenario analyses to qualified third-parties.[306] The commenter explained that requiring scenario analysis disclosure on a transaction-by-transaction basis would not be necessary because SBS Entity counterparties are generally sophisticated enough to create their own, more meaningful, portfolio-based analyses, but that scenario analyses could help a less sophisticated counterparty understand the dynamics and potential exposure of security-based swaps on a portfolio-level.[307] The commenter also noted that the Commission should encourage all market participants to create or obtain a portfolio-level scenario analysis, in keeping with industry best practices.[308]

Four commenters opposed requiring disclosure of scenario analysis.[309] One noted that requiring scenario analysis disclosure would have potentially significant adverse consequences for special entities and other counterparties, and urged the Commission to refrain from requiring it.[310] Specifically, the commenter explained that requiring scenario analysis would likely delay execution of transactions and expose counterparties to market risk for potentially extended periods of time (including at critical times when the counterparty is seeking to hedge its positions in volatile markets) because the development of scenario analyses depends upon the specific terms agreed by the parties and therefore, cannot be performed until full agreement on the material terms is reached.[311] Additionally, the commenter noted that the development of such analyses would cause SBS Entities to incur substantial costs, which ultimately would be passed on to counterparties.[312] Another commenter opposed a requirement to provide scenario analysis and asserted that, if a scenario analysis is required, it should only be at the request of the counterparty and only with respect to scenarios based on parameters selected by the counterparty.[313] The commenter also expressed concern that providing a scenario analysis could be viewed as a "recommendation" that triggers other requirements under the proposed rules (*e.g.*, suitability requirements).[314]

A third commenter, writing after the CFTC adopted final rules,[315] stated that, in its experience, the CFTC's scenario analysis requirement has complicated the ability of SBS Dealers to provide different pricing scenarios, either voluntarily or at the request of a counterparty, because it creates "uncertainty as to when those scenarios must satisfy the requirements for scenario analysis set forth in the CFTC EBC rules."[316]

A fourth commenter recommended that, to the extent a Major SBS Participant is transacting with an ECP at arm's-length, the Commission should explicitly exclude scenario analysis from the information that the Major SBS Participant is required to disclose pursuant to Rule 15Fh–3(b).[317] The commenter asserted that scenario analysis disclosure would be costly and redundant since the rule would already require Major SBS Participants to undertake a transaction-specific analysis, and prepare tailored disclosures of a transaction's loss sensitivities to market factors and conditions, and the magnitude of gains and losses the transaction may experience under specified circumstances.[318]

iii. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(b)(1) with some modifications requested by commenters to more closely align the requirements of our rules with those of the CFTC.

We have revised the descriptions in Rule 15Fh–3(b)(1) of the required disclosures of material risks and characteristics of a security-based swap to harmonize with the descriptions in the parallel CFTC disclosure requirement. As adopted, Rule 15Fh–3(b)(1) requires an SBS Entity to disclose material information in a manner reasonably designed to allow the counterparty to assess the material risks and characteristics of the particular security-based swap, which may include (1) market risk,[319] credit risk,[320] liquidity risk,[321] foreign currency risk, legal risk,[322] operational risk[323] and any other applicable risks, and (2) the material economic terms of the security-based swap, and the rights and obligations of the parties during the term of the security-based swap. These changes are intended to provide an illustrative list of material risks and characteristics. In addition, these changes will harmonize our rule with the requirements of the CFTC rule, which should result in efficiencies for SBS Entities that have already established infrastructure to comply with the CFTC rules, while still achieving the objectives of the rule to provide information to a counterparty to help them assess whether, and under what terms, they want to enter into the transaction.

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[299] *Id.*

[300] *Id.*

[301] *See* Barnard, *supra* note 5; Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Markit, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5; MFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[302] *See* Barnard, *supra* note 5; Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Markit, *supra* note 5.

[303] *See* Better Markets (August 2011), *supra* note 5.

[304] *See* Barnard, *supra* note 5.

[305] *See* Markit, *supra* note 5.

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2011), *supra* note 5; MFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[310] *See* SIFMA (August 2011), *supra* note 5.

[311] *Id.*

[312] *Id.*

[313] *See* FIA/ISDA/SIFMA, *supra* note 5.

[314] *Id.*

[315] The CFTC had proposed to require scenario analysis for "high-risk complex bilateral swaps" but in its final rules determined instead to require scenario analysis only when requested by the counterparty for any swap not "made available for trading" on a designated contract market or swap execution facility. To comply with the CFTC rule, swap dealers must disclose to counterparties their right to receive scenario analysis and consult with counterparties regarding design. *See* CFTC Adopting Release, 77 FR at 9762–9763, *supra* note 21. *See also* 17 CFR 23.431(b).

[316] *See* SIFMA (August 2015), *supra* note 5.

[317] *See* MFA, *supra* note 5.

[318] *Id.*

[319] By "market risk," we mean the risk to the value of a security-based swap "resulting from adverse movements in the level or volatility of market prices." *See* Proposing Release, 76 FR at 42408 n.82, *supra* note 3.

[320] By "credit risk," we mean the risk that a counterparty to a security-based swap "will fail to perform on an obligation" under the security-based swap. *See* Proposing Release, 76 FR at 42408 n.80, *supra* note 3.

[321] By "liquidity risk," we mean the risk that a counterparty to a security-based swap "may not be able to, or cannot easily, unwind or offset a

The rule as adopted requires disclosure of "material" information regarding material risks and characteristics and material incentives or conflicts of interests. We believe that this modification will provide for an appropriate level of disclosure by requiring disclosure of "material" information, that is, the information most relevant to a counterparty's assessment of whether and under what terms to enter into a security-based swap. In addition, it will harmonize with the CFTC approach, promoting regulatory consistency across the swap and security-based swap markets, particularly among entities that transact in both markets and have already established infrastructure to comply with existing CFTC regulations. In response to comment, the Commission believes that for purposes of evaluating the material risks and characteristics of the particular security-based swap, including its economic terms, material information about the referenced security, index, asset or issuer should be disclosed.[324] As one commenter suggested, this disclosure would be particularly important when, for example, the security-based swap references unique pools of assets arranged by the SBS Entity.[325]

The Commission anticipates that SBS Entities may provide these disclosures through various means, including by providing a scenario analysis, as noted in the Proposing Release.[326] We are not, however, adopting any requirements that would require an SBS Entity to provide scenario analysis. Although scenario analysis may prove a valuable analytic tool, it is one means by which information may be conveyed, and we acknowledge the concerns of commenters that a scenario analysis may not be necessary or appropriate in every situation to ensure that appropriate disclosures are made. We note, however, that nothing in our rules would preclude parties from requesting such analysis, even if a security-based swap is "made available for trading." In this regard, our approach differs from that of the CFTC which requires a Swap Dealer to provide scenario analysis when requested by a counterparty for any swap that is not "made available for trading" on a designated contract market or swap execution facility. We believe, however, that the approaches are consistent because, as noted above, the Commission is not prohibiting counterparties from requesting scenario analysis disclosure.

As noted in the Proposing Release, these disclosures are intended to pertain to the material risks and characteristics of the security-based swap, and not the material risks and characteristics of the security-based swap with respect to a particular counterparty.[327]

d. Material Incentives or Conflicts of Interest

i. Proposed Rule

Proposed Rule 15Fh–3(b)(2) would require the SBS Entity to disclose any material incentives or conflicts of interest that it may have in connection with the security-based swap, including any compensation or other incentives from any source other than the counterparty in connection with the security-based swap to be entered into with the counterparty.[328] We explained in the Proposing Release that we preliminarily believed that the term "incentives"—which is used in Section 15F(h)(3)(b)(ii) of the Dodd-Frank Act—refers not to any profit or return that the SBS Entity would expect to earn from the security-based swap itself, or from any related hedging or trading activities of the SBS Entity, but rather to any other financial arrangements pursuant to which an SBS Entity may have an incentive to encourage the counterparty to enter into the transaction. This disclosure would include, among other things, information concerning any compensation (*e.g.,* under revenue-sharing arrangements) or other incentives the SBS Entity receives from any source other than the counterparty in connection with the security-based swap to be entered into with the counterparty, but would not include, for example, expected cash flows received from a transaction to hedge the security-based swap or that the security-based swap is intended to hedge.[329]

ii. Comments on the Proposed Rule

Seven commenters addressed the disclosure of material incentives or conflicts of interest.[330] One commenter expressed strong support for the proposed rule.[331] A second commenter also supported the proposed rule, noting that it is consistent with the CFTC's parallel requirement, except for the CFTC's requirement to disclose a pre-trade mid-market mark, which the commenter argued is of limited benefit and delays execution of transactions.[332] Three other commenters expressed support for the proposed rule but also suggested certain revisions to the rule.[333] One recommended modifying the rule to include specific disclosures by SBS Entities of any affiliations or material business relationships they may have with any provider of security-based swap valuation services.[334] Another noted that an SBS Entity's biggest conflict of interest would likely be the difference in compensation between selling a security-based swap (and in particular, a customized security-based swap) versus another

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particular position at or near the previous market price because of inadequate market depth or because of disruptions in the marketplace." *See* Proposing Release, 76 FR at 42408 n.83, *supra* note 3.

[322] By "legal risk," we mean the risk that agreements are unenforceable or incorrectly or inadequately documented. *See* Proposing Release, 76 FR at 42408 n.85, *supra* note 3.

[323] By "operational risk," we mean the risk that "deficiencies in information systems or internal controls, [including human error,] will result in unexpected loss." *See* Proposing Release, 76 FR at 42408 n.84, *supra* note 3.

[324] The manner in which and extent of information about the referenced security, index, asset or issuer is disclosed would depend on the particular facts and circumstances, including the public availability of the information.

[325] *See* Levin, *supra* note 5.

[326] *See* Proposing Release, 76 FR at 42408 n.88, *supra* note 3.

[327] *See* Proposing Release, 76 FR at 42408 n.87, *supra* note 3. However, if an SBS Dealer recommends a security-based swap or trading strategy involving a security-based swap, or acts as an advisor to a special entity, for example, Rules 15Fh–3(f) and 15Fh–4, respectively, impose certain counterparty-specific requirements. *See* Rules 15Fh–3(f) and 15Fh–4, discussed *infra* in Sections II.G.0 and II.H.3.

[328] *See* Section 15F(h)(3)(B)(ii) of the Exchange Act, 15 U.S.C. 78o–10(h)(3)(B)(ii) (providing that business conduct requirements adopted by the Commission shall require disclosure by an SBS Entity of "any material incentives or conflicts of interest" that the SBS Entity may have in connection with the security-based swap).

[329] *See* Proposing Release, 76 FR at 42409, *supra* note 3.

[330] *See* Barnard, *supra* note 5; IDC, *supra* note 5; CFA, *supra* note 5; Levin, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[331] *See* Barnard, *supra* note 5.

[332] *See* SIFMA (August 2015), *supra* note 5.

[333] *See* IDC, *supra* note 5; CFA, *supra* note 5; Levin, *supra* note 5.

[334] *See* IDC, *supra* note 5.

product with similar economic terms.[335] Accordingly, the commenter recommended that SBS Entities be required to include any differential compensation in their disclosure.[336] Additionally, the commenter asserted that if an SBS Entity is entering a trade as part of a trading strategy to move a position off its books, the SBS Entity should be required to disclose that particular conflict of interest and that the security-based swap is recommended to effect that strategy.[337] A third commenter suggested coordinating the proposed rule with the conflict of interest prohibitions in Sections 619 and 621 of the Dodd-Frank Act to clarify that those prohibitions cannot be circumvented through application of the business conduct disclosure requirements.[338] The commenter also recommended including in these required disclosures any otherwise hidden profits or returns that the SBS Entity expects to make from a security-based swap, related agreement or arrangement, or related hedging or trading activity.[339]

One commenter objected to any requirement that an SBS Entity disclose its anticipated profit for the security-based swap.[340] The commenter asserted that the best protection for a counterparty is reviewing and selecting the best available pricing.[341]

iii. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(b)(2) as proposed.

As noted in the Proposing Release, the Commission believes that the term "incentives"—which is used in Section 15F(h)(3)(b)(ii) of the Dodd-Frank Act—refers not to any profit or return that the SBS Entity would expect to earn from the security-based swap itself, or from any related hedging or trading activities of the SBS Entity, but rather to any other financial arrangements pursuant to which an SBS Entity may have an incentive to encourage the counterparty to enter into the transaction.[342] Accordingly, the disclosure required pursuant to Rule 15Fh–3(b)(2) generally should include information concerning any compensation (for example, under revenue-sharing arrangements) or other incentives the SBS Entity receives from any source other than the counterparty in connection with the security-based swap to be entered into with the counterparty but will not include, for example, expected cash flows received from a transaction to hedge the security-based swap or that the security-based swap is intended to hedge.

As discussed above, whether a conflict or incentive is material depends on the facts and circumstances of the particular matter. Although we are not expressly requiring disclosure of differential compensation as requested by the commenter, the difference in compensation an SBS Entity may receive for selling a security-based swap versus another product with similar economic terms may create a material incentive or conflict of interest that would need to be disclosed under the framework discussed above. Similarly, an SBS Entity would need to disclose material information concerning affiliations or material business relationships it may have with any provider of security-based swap valuation providers if those relationships create a material incentive or conflict of interest. Regarding the commenter's concern that the conflict of interest prohibitions in Sections 619 and 621 of the Dodd-Frank Act might be circumvented through application of the business conduct disclosure requirements,[343] nothing in our rules limits or restricts the applicability of other relevant laws.[344]

e. Daily Mark

Exchange Act Section 15F(h)(3)(B)(iii) directs that business conduct requirements adopted by the Commission require an SBS Entity to disclose to a counterparty (other than to another SBS Entity or Swap Entity): (i) For cleared security-based swaps, upon request of the counterparty, the daily mark from the appropriate derivatives clearing organization;[345] and (ii) for uncleared security-based swaps, the daily mark of the transaction.

i. Proposed Rule

Proposed Rule 15Fh–3(c) would require an SBS Entity to disclose to its counterparty (other than to another SBS Entity or Swap Entity): (1) For a cleared security-based swap, upon the request of the counterparty, the daily end-of-day settlement price that the SBS Entity receives from the appropriate clearing agency, and (2) for an uncleared security-based swap, the midpoint between the bid and offer, or the calculated equivalent thereof, as of the close of business, unless the parties agree in writing to a different time, on each business day during the term of the security-based swap. Proposed Rule 15Fh–3(c)(2) would specify that the daily mark for an uncleared security-based swap may be based on market quotations for comparable security-based swaps, mathematical models or a combination thereof. Proposed Rule 15Fh–3(c)(2) also would require disclosure of the data sources and a description of the methodology and assumptions used to prepare the daily mark for an uncleared security-based swap, as well as any material changes to such data sources, methodology or assumptions during the term of the security-based swap.

ii. Comments on Proposed Rule

Ten comment letters addressed the requirement for SBS Entities to provide a daily mark.[346]

One commenter suggested modifications to the daily mark requirement to harmonize with the CFTC's parallel requirement.[347] Specifically, for cleared security-based swaps, the commenter recommended that an SBS Entity simply be required to notify a counterparty of its right to receive the daily mark from the appropriate clearing agency upon request.[348] The commenter also argued that the CFTC's description of the clearinghouse's mark is less prescriptive.[349] Additionally, the commenter recommended that the Commission provide guidance clarifying that an SBS Entity will be deemed to satisfy the daily mark requirement for cleared security-based swaps if the counterparty has agreed to receive its daily mark from its clearing member.[350]

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[335] *See* CFA, *supra* note 5.

[336] *Id.*

[337] *Id.*

[338] *See* Levin, *supra* note 5.

[339] *Id.*

[340] *See* FIA/ISDA/SIFMA, *supra* note 5.

[341] *Id.*

[342] *See* Proposing Release, 76 FR at 42409, *supra* note 3.

[343] *See* Levin, *supra* note 5.

[344] For instance, depending on the facts and circumstances, failure to disclose material conflicts of interest when there is a recommendation by a broker-dealer can be a violation of the antifraud rules. *See, e.g., Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970) (explaining that failure to inform a customer fully of a possible conflict of interest in the securities which the broker recommended for purchase was an omission of material fact in violation of Rule 10b–5). *See also In the Matter of Richmark Capital Corp.*, Exchange Act Release No. 48758 (Nov. 7, 2003) (Commission opinion) ("When a securities dealer recommends stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts of which it is aware. That includes disclosure of 'adverse interests' such as 'economic self-interest' that could have influenced its recommendation.") (citations omitted).

[345] As noted in the Proposing Release, although Section 15F(h)(3)(B)(iii) of the Exchange Act refers to a "derivatives clearing organization," the Commission believes that this was a drafting error and that Congress intended to refer to a "clearing agency" because the Dodd-Frank Act elsewhere requires security-based swaps to be cleared at registered clearing agencies, not derivatives clearing organizations. *See* Proposing Release, 76 FR at 42410 n.98, *supra* note 3; Section 17A(g) of the Exchange Act, 15 U.S.C. 78q–1(g).

[346] *See* Barnard, *supra* note 5; Levin, *supra* note 5; IDC, *supra* note 5; AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2011); SIFMA (August 2015), *supra* note 5.

[347] *See* SIFMA (August 2015), *supra* note 5.

[348] *Id.*

One commenter asserted that requiring SBS Entities to provide daily marks would not further the goal of providing helpful transparency because in most transactions marks are typically either based on internal models or derived from indices with which the transactions are not perfectly matched.[351] Another commenter asked the Commission to carefully review and consider the costs of such a requirement before imposing any obligation to provide daily marks, other than those agreed upon for collateral purposes or for which midmarket quotations are observable.[352] The commenter also requested that "sophisticated counterparties" be permitted to opt out of this requirement, and recommended that the Commission clarify that where parties have agreed upon a basis for margining uncleared security-based swaps, providing the daily mark used to make the related margin calculation should satisfy the SBS Entity's daily mark disclosure obligations.[353]

One commenter suggested that the data sources, methodology and assumptions used to prepare the daily mark should be required to constitute a complete and independently verifiable methodology for valuing each security-based swap entered into between the parties, noting that this would promote objectivity and transparency, and aid in the resolution of disputes.[354] In this regard, a second commenter also expressed support for requiring the provision of a daily mark and specifically for requiring disclosure of any material changes to the data sources, methodology and assumptions used to prepare the daily mark, noting that this should include disclosing if the data sources become unreliable or unavailable and any resulting changes to the valuations.[355]

A third commenter recommended requiring disclosure as to how the daily mark is calculated, including such information as whether the daily mark was calculated based on inputs related to actual trade activity, using mathematical models, quotes and prices of other comparable securities, and whether those inputs came from third-party valuation service providers.[356] The commenter added, however, that the proposed disclosure of the data sources and the description of the methodology and assumptions used were not likely to require the disclosure of proprietary information and that a general description of key valuation inputs should be sufficient.[357] Likewise, another commenter also recommended that the Commission clarify in rule text that an SBS Entity is not required to disclose confidential, proprietary information about any model it may use to prepare the daily mark.[358]

This commenter also recommended that an SBS Entity should disclose additional information concerning its daily mark to ensure a fair and balanced communication, including that: (1) The daily mark may not necessarily be a price at which the SBS Entity or counterparty would agree to replace or terminate the security-based swap; (2) calls for margin may be based on considerations other than the daily mark; and (3) the daily mark may not necessarily be the value of the security-based swap that is marked on the books of the SBS Entity.[359] Additionally, this commenter advocated for eliminating the proposed requirement for the SBS Entity to disclose its data sources used to prepare the daily mark to harmonize more closely with the CFTC rule, which requires disclosure of assumptions and methodologies but not data sources.[360]

One commenter noted that Major SBS Participants, unlike SBS Dealers, will not always have access to sufficient market information to provide a daily mark, particularly if the security-based swap is not actively traded or if there are no current bid and offer quotes.[361] The commenter expressed concern that this could cause Major SBS Participants to have to reveal proprietary information about their trading book positions, particularly when providing the methodology and inputs that they used to prepare the daily mark.[362] The commenter suggested permitting sophisticated counterparties to opt out of receiving daily marks.[363] Another commenter suggested either not requiring Major SBS Participants to provide the daily mark to its counterparties or in the alternative, to exempt transactions between Major SBS Participants and SBS Dealers and allow all other counterparties to opt out of receiving such disclosures.[364]

Several commenters raised potential conflicts of interest concerns in connection with providing the daily mark for uncleared security-based swaps. Two commenters recommended requiring SBS Entities to use third-party quotations whenever possible to calculate the daily mark for uncleared security-based swaps.[365] One commenter suggested allowing use of the midpoint between an SBS Entity's bid and offer prices only when the SBS Entity's internal book value falls within the same price range.[366] Additionally, this commenter suggested that the Commission consider requiring the SBS Entity to provide clients with actionable quotes or prices at which the SBS Entity would terminate the swap or allow the client to buy more, and with actionable quotes at a significant size as a means to ensure accuracy.[367] Another commenter noted its view that defining the daily mark for uncleared security-based swaps as the midpoint between the bid and offer prices, or the calculated equivalent thereof, could be problematic because it may present a conflict of interest for SBS Entities, particularly when the security-based swaps are not actively traded or do not have consistent or up-to-date bid and offer quotes.[368] This commenter also suggested requiring SBS Entities and their counterparties to have a clearly defined process for resolving any potential valuation disputes.[369]

Two commenters addressed the communication of daily marks, supporting the use of web-based methods of communication.[370] One commenter advocated for web-based systems to be the preferred method of communication, but noted that since some market participants prefer more traditional methods of communication, web-based systems should not be required.[371] The commenter recommended requiring SBS Entities to have policies and procedures in place that reasonably ensure that any non-electronic means of communication is safe and secure and is otherwise comparable to web-based systems.[372] Additionally, the commenter generally requested that the Commission provide greater clarity on permissible methods for delivering daily mark disclosures, establish minimum requirements for the communication of daily marks (for instance, that the interfaces used provide counterparties with appropriate tools to initiate, track and close valuation disputes), and require SBS Entities to ensure that the method of communication is designed to protect the confidentiality of the data and prevent any unintentional or fraudulent addition, modification or deletion of a valuation record.[373] The second commenter suggested that the use of a secure Web site or electronic platform should be required to enhance data security.[374] The commenter noted that such a platform could also be used to provide transparency into the inputs used to determine the daily mark and to initiate inquiries or challenges to the daily mark.[375] The commenter also recommended that the Commission require daily mark information to be provided without charge.[376]

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[349] *Id.*

[350] *Id.*

[351] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[352] *See* FIA/ISDA/SIFMA, *supra* note 5.

[353] *Id.*

[354] *See* Barnard, *supra* note 5.

[355] *See* Levin, *supra* note 5.

[356] *See* IDC, *supra* note 5.

[357] *Id.*

[358] *See* SIFMA (August 2015), *supra* note 5.

[359] *Id.*

[360] *Id.*

[361] *See* MFA, *supra* note 5.

[362] *Id.*

[363] *Id.*

[364] *See* BlackRock, *supra* note 5.

[365] *See* Levin, *supra* note 5; and IDC, *supra* note 5.

[366] *See* Levin, *supra* note 5.

[367] *Id.*

[368] *See* IDC, *supra* note 5.

[369] *See* IDC, *supra* note 5.

[370] *See* Markit, *supra* note 5; IDC, *supra* note 5.

[371] *See* Markit, *supra* note 5.

iii. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(c) as proposed, with modifications.

Cleared Security-Based Swaps

In response to concerns raised by a commenter,[377] the Commission is modifying the requirement in Rule 15Fh–3(c)(1) concerning delivery of the daily mark for cleared security-based swaps. For cleared security-based swaps, the proposed rule would have required the SBS Entity upon the request of the counterparty to provide the counterparty with the end-of-day settlement price the SBS Entity received from the clearing agency. As adopted, for cleared security-based swaps, Rule 15Fh–3(c)(1) requires an SBS Entity upon the request of the counterparty to provide to the counterparty the daily mark that the SBS Entity receives from the appropriate clearing agency.

In response to comments, the Commission is clarifying that to fulfill its obligation to provide the daily mark upon request, the SBS Entity may agree with the clearing agency, a clearing member or another agent, for such clearing agency, clearing member or other agent to provide the daily mark directly to the counterparty.[378] The SBS Entity, however, would retain the regulatory responsibility to provide the daily mark upon request. We understand that current market practice is for a clearing agency to provide access to end-of-day settlement prices to the counterparty. We believe that this flexibility is appropriate, as we believe errors in transmission are less likely to occur if the counterparty receives the information directly from the appropriate clearing agency, which is the source of the daily mark for cleared security-based swaps. In addition, these changes will align our rule more closely with the comparable CFTC rule, which allows for the counterparty to receive the daily mark for a cleared swap from access to the derivatives clearing organization or futures commodities merchant or from the Swap Entity, which should result in efficiencies for SBS Entities that have already established infrastructure to comply with the CFTC rule.[379] We note that an SBS Entity's obligation to provide the daily mark, if requested by the counterparty, exists for the life of the security-based swap between the SBS Entity and the counterparty. Depending on the form of clearing that is used to clear the security-based swap, the security-based swap between the SBS Entity and the counterparty may be terminated upon clearing by the clearing agency.[380]

Rule 15Fh–3(c)(1), as adopted, also requires that the SBS Entity provide the daily mark (as opposed to the end-of-day settlement price) upon request to the counterparty to allow clearing agencies the flexibility to provide a different calculation of the mark in the future. As noted above, we understand that current market practice is for the clearing agency to provide an end-of-day settlement price as its mark. In addition, this change will conform our rule more closely to the parallel CFTC rule described above.

Uncleared Security-Based Swaps

The Commission is adopting Rule 15Fh–3(c)(2) as proposed. The Commission agrees with commenters[381] that the daily mark for uncleared security-based swaps will provide helpful transparency to counterparties during the lifecycle of a security-based swap by providing a useful and meaningful reference point against which to assess, among other things, the calculation of variation margin for a security-based swap or portfolio of security-based swaps, and otherwise inform the counterparty's understanding of its financial relationship with the SBS Entity.[382] We continue to believe that even if the mark is calculated based on internal models or such indices, its provision by the SBS Entity will further the goal of providing helpful transparency into the SBS Entity's pricing and valuation of the security-based swap by providing a helpful reference point that the SBS Entity's counterparty can take into account when evaluating the pricing and valuation of the SBS. Thus, we disagree with the commenter[383] who believes that providing the daily mark will not enhance transparency.

As noted in the Proposing Release, though the daily mark may be used as an input to compute the variation margin between an SBS Entity and its counterparty, it is not necessarily the sole determinant of how such margin is computed. Differences between the daily mark and computations for variation margin may result from adjustments for position size, position direction, credit reserve, hedging, funding, liquidity, counterparty credit quality, portfolio concentration, bid-ask spreads, or other costs. Moreover, we understand that the actual computations may be highly negotiated between the parties. Therefore, we decline to implement the commenter's suggestion that the basis for margining uncleared security-based swaps would satisfy the daily mark disclosure obligations.

For uncleared security-based swaps, Rule 15Fh–3(c)(2) as adopted defines the daily mark as the midpoint between the bid and offer prices for a particular uncleared security-based swap, or the calculated equivalent thereof, as of the close of business unless the parties otherwise agree in writing to a different time.[384] The Commission continues to believe that, absent specific agreement by the parties otherwise, the rule will result in a daily mark that reflects daily changes in valuation and that is: (a) The same for all counterparties of the SBS Entity that have a position in the uncleared security-based swap, (b) not adjusted to account for holding-specific attributes such as position direction, size, or liquidity, and (c) not adjusted to account for counterparty-specific attributes such as credit quality, other counterparty portfolio holdings, or concentration of positions.[385]

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[372] *Id.*

[373] *Id.*

[374] *See* IDC, *supra* note 5.

[375] *Id.*

[376] *Id.*

[377] SIFMA (August 2015), *supra* note 5.

[378] *See* SIFMA (August 2015), *supra* note 5.

[379] *See* 17 CFR 23.431(d); and CFTC Adopting Release, *supra* note 21.

[380] If, for example, the security-based swap between the SBS Entity and counterparty is terminated upon novation by the clearing agency, the SBS Entity would no longer have any obligation to provide a daily mark to the original counterparty because a security-based swap no longer exists between them.

[381] *See* Barnard, *supra* note 5; Levin, *supra* note 5; IDC, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[382] *See* Proposing Release, 76 FR at 42410, *supra* note 3.

[383] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[384] As noted in the Proposing Release, parties could agree that the daily mark would be computed as of a time other than the close of business but could not agree to waive the requirement that the daily mark be provided on a daily basis, as required by the statute. *See* Proposing Release, 76 FR at 42411 n.103, *supra* note 3.

As noted in the Proposing Release, for actively traded security-based swaps that have sufficient liquidity, computing a daily mark as the midpoint between the bid and offer prices for a particular security-based swap, known as a "midmarket value," would be consistent with Rule 15Fh–3(c)(2).[386] For security-based swaps that are not actively traded, or do not have up-to-date bid and offer quotes, the SBS Entity may calculate an equivalent to a midmarket value using mathematical models, quotes and prices of other comparable securities, security-based swaps, or derivatives, or any combination thereof. In this regard, the rule as adopted requires that the SBS Entity disclose its data sources and a description of the methodology and assumptions used to prepare the daily mark, and promptly disclose any material changes to such data sources, methodology and assumptions during the term of the security-based swap. One commenter suggested that the disclosures should include how the daily mark is calculated, including whether the daily mark is calculated based on inputs related to actual trade activity or using mathematical models, quotes and prices of other comparable securities, and whether those inputs came from third-party valuation service providers.[387] We believe that the requirement in the rule to disclose data sources, methodologies and assumptions encompasses this commenter's suggestion. On the other hand, another commenter has expressed concern that disclosure of data sources, methodology and assumptions would require the SBS Entity to disclose confidential, proprietary information about its models.[388] We believe achieving the benefits underlying the statutory daily mark requirement require that each counterparty knows the data sources, methodology and assumptions used to calculate the mark. This information is critical for a counterparty to properly understand how the daily mark was calculated. The Commission believes that such disclosures will provide the counterparty useful context with which it can assess the quality of the mark received.[389] The Commission further agrees with the commenter that these disclosures would promote objectivity and transparency.[390] This commenter also suggested that this description of data sources, methodologies and assumptions should be required to constitute a complete and independently verifiable methodology for valuing each security.[391] To satisfy the duty to disclose the data sources, methodology and assumptions used to prepare the daily mark, SBS Entities may choose to provide to counterparties methodologies and assumptions sufficient to independently validate the output from a model generating the daily mark. The Commission does not foresee that these disclosures would require SBS Entities to disclose confidential, proprietary information about any model it may use to prepare the daily mark.[392] With these disclosures, counterparties should not be misled or unduly rely on the daily mark provided by the SBS Entities. Therefore, the Commission's final rule requires disclosure of the data sources, methodology and assumptions underlying the daily mark for uncleared security-based swaps.

A commenter suggested that the daily mark disclosures would assist in resolving valuation disputes during the term of the security-based swap.[393] Another commenter suggested requiring SBS Entities and their counterparties to have a clearly defined process for resolving any potential valuation disputes about daily marks for both cleared and uncleared security-based swaps.[394] The Commission notes that many market participants separately negotiate a dispute resolution mechanism for disagreements regarding valuations or include standardized language regarding dispute resolution in their agreements. At this time, the Commission declines to require parties to have a process for resolving valuation disputes and leaves the parties the flexibility to include such dispute resolution mechanisms in their negotiations if desired.

Two commenters suggested that Major SBS Participants should not be required to provide the daily mark for uncleared security-based swaps.[395] We believe that the benefits of Rule 15Fh–3(c), as discussed above, would inure equally to counterparties that transact with SBS Dealers as well as those that transact with Major SBS Participants. As we have noted above, even with the use of proprietary models to calculate the daily mark, we do not believe that the level of detail required to be disclosed would require an SBS Entity to disclose confidential proprietary information, whether the SBS Entity is an SBS Dealer or a Major SBS Participant. The commenter that expressed concerns regarding the reliability of the daily mark illustrates the necessity of the disclosure of the data sources, methodologies and assumptions underlying the calculation. Counterparties may evaluate the calculation and reliability of the daily mark calculation and determine for themselves whether or not to rely on the calculation. Furthermore, we do not find the arms-length nature of relationships with counterparties to be a persuasive argument to eliminate the daily mark requirement. To the extent that Major SBS Participants may be better informed about the valuations of security-based swaps due to significant information asymmetries in a market for opaque and complex products, disclosures may help inform counterparties concerning the valuations and material risks and characteristics of security-based swaps in the sometimes rapidly changing market environment.[396] The commenter also states that the vast majority of transactions by a Major SBS Participant would be with an SBS Dealer, in which circumstance, the disclosure is not required. As a result, we are not adopting the commenters' suggestions to exclude Major SBS Participants from the requirement of providing the daily mark disclosure at this time.

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[385] *See* Proposing Release, 76 FR at 42411, *supra* note 3.

[386] *See* Proposing Release, 76 FR at 42411, *supra* note 3. See also Improving Counterparty Risk Management Practices, Counterparty Risk Management Policy Group (June 1999) at 7 (for use of the term "mid-market value"). For a discussion of mid-market value and costs, *see also* ISDA Research Notes, The Value of a New Swap, Issue 3 (2010), *available at http://www.isda.org/researchnotes/pdf/NewSwapRN.pdf.*

[387] *See* IDC, *supra* note 5.

[388] *See* SIFMA (August 2015), *supra* note 5.

[389] The Commission recognizes that different SBS Entities may produce somewhat different marks for similar security-based swaps, depending on the respective data sources, methodologies and assumptions used to calculate the marks. Thus, the data sources, methodologies and assumptions would provide a context in which the quality of the mark could be evaluated. *See* Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Securities Act Release No. 7386 (Jan. 31, 1997), 62 FR 6044 (Feb. 10, 1997). The Commission understands that industry practice is often to include similar disclosures for margin calls in swap documentation, such as a credit support annex. *See* Proposing Release, 76 FR at 42411 n.109, *supra* note 3.

[390] *See* Barnard, *supra* note 5.

[391] *See* Barnard, *supra* note 5.

[392] We also note that methodologies and assumptions with respect to various models are disclosed in the context of financial statement reporting in footnotes to publicly available financial statements and Management's Discussion and Analysis in periodic reports under the Exchange Act without disclosing confidential proprietary information about models. *See* FASB Accounting Standards Codification Topic 820, Fair Value Measurements and Disclosures; 17 CFR 229.303; and 17 CFR 229.305.

[393] *See* Barnard, *supra* note 5.

[394] *See* IDC, *supra* note 5.

[395] *See* MFA, *supra* note 5 (suggesting that Major SBS Participants will have to use proprietary models, which will force the Major SBS Participants to reveal proprietary information about their trading book positions and that such calculations would be sufficient to calculate a fund's total asset value but should not be relied upon by other market participants) and BlackRock, *supra* note 5 (arguing that the security-based swaps are arms-length transactions so the Major SBS Participant should not be required to develop systems to deliver the daily mark information, particularly since most transactions will be with an SBS Dealer). As an alternative to eliminating the daily mark requirement for Major SBS Participants, these commenters suggest that sophisticated counterparties should be permitted to opt out of receiving the daily mark. *See* discussion above regarding the Commission's reasons for not permitting counterparties to opt out of receiving the daily mark disclosure.

The Commission has considered the rationale raised by commenters and decided not to allow counterparties, even "sophisticated counterparties," to opt-out of the protections afforded by the daily mark disclosures. It is our understanding that counterparties have a range of sophistication and some are unlikely to have their own modeling capabilities or access to relevant data to calculate a daily mark themselves. We think it is appropriate to apply the rule so that counterparties receive the benefits of the daily mark and related disclosures, and do not think it appropriate to permit parties to "opt out" of the benefits of those provisions.

A commenter suggested modifying the rule text for uncleared security-based swaps to require that the SBS Entity disclose additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that: (A) The daily mark may not necessarily be a price at which either the counterparty or the SBS Entity would agree to replace or terminate the security-based swap; (B) depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and (C) the daily mark may not necessarily be the value of the security-based swap that is marked on the books of the SBS Entity.[397] While the Commission declines to modify the rule text in this way, it does note that Rule 15Fh–3(g) as adopted requires an SBS Entity to communicate with its counterparty in a fair and balanced manner.[398] As a result, an SBS Entity may generally wish to consider disclosing this information.

Against this background, the Commission is not prescribing the means by which an SBS Entity determines the daily mark for an uncleared security-based swap. Commenters have made various suggestions as to additional requirements as to the inputs used for the daily mark calculation, such as requiring independent third-party quotes or limiting the context in which an SBS Entity can use its own bid and offer prices or requiring the daily mark to be an actionable quote.[399] At this time, the Commission declines to adopt these additional requirements. We believe that the rule as adopted will provide appropriate flexibility for SBS Entities to determine how to calculate the daily mark while providing disclosure of sufficient information—data sources, methodologies and assumptions, which are designed to allow the counterparty to assess the quality of the marks it receives from the SBS Entity. One of these commenters also suggested that using its own bid and offer prices for the calculation of the daily mark may present a conflict of interest for the SBS Entity.[400] If the SBS Entity is presented with a conflict of interest, we believe that the SBS Entity likely would disclose the conflict to the counterparty pursuant to Rule 15Fh–3(b)(2) if the conflict is material. After receiving such disclosures, the counterparty will be able to factor that information into its assessment of the quality of the marks it receives. Consistent with the considerations outlined above, an SBS Entity may choose to do these calculations in-house or to use independent third-party valuation services, as suggested by a commenter.[401]

As noted above, Rule 15Fh–3(c)(2) requires an SBS Entity to disclose to the counterparty its data sources and a description of the methodology and assumptions used to prepare the daily mark for an uncleared security-based swap. Additionally, Rule 15Fh–3(c)(2) requires an SBS Entity to promptly disclose any material changes to the data sources, methodology, or assumptions during the term of the security-based swap. As noted in the Proposing Release, an SBS Entity is not required to disclose the data sources or a description of the methodology and assumptions more than once unless it materially changes the data sources, methodology or assumptions used to calculate the daily mark.[402] For the purposes of this rule, a material change would generally include any change that has a material impact on the daily mark provided, such as if the data sources become unreliable or unavailable, as requested by one commenter.[403]

A commenter has requested that we eliminate the requirement to disclose data sources to harmonize more closely with the CFTC.[404] We believe that the requirement to disclose data sources is important for the counterparty to understand and assess the mark being provided. Therefore, we decline to eliminate this requirement.

Applicable to Both Cleared and Uncleared Security-Based Swaps

Rule 15Fh–3(c) as adopted, does not mandate the means by which an SBS Entity must make the required disclosures and the Commission declines to mandate any particular means at this time. The Commission believes that SBS Entities are best positioned to determine the most appropriate means of communication of the disclosures. Commenters have made several specific suggestions for additional requirements regarding the means of communication of the daily mark.[405] One commenter suggested that we require the use of a secure Web site or electronic platform.[406] Another commenter requested web-based systems to be the preferred method of communication, but noted that since some market participants prefer more traditional methods of communication, web-based systems should not be required.[407] The commenter recommended requiring SBS Entities to have policies and procedures in place that reasonably ensure that any non-electronic means of communication is safe and secure and is otherwise comparable to web-based systems.[408] Additionally, the commenter generally requested that the Commission provide greater clarity on permissible methods for delivering daily mark disclosures, establish minimum requirements for the communication of daily marks (for instance, that the interfaces used provide counterparties with appropriate tools to initiate, track and close valuation disputes), and require SBS Entities to ensure that the method of communication is designed to protect the confidentiality of the data and prevent any unintentional or fraudulent addition, modification or deletion of a valuation record.[409] The Commission continues to believe that such a method of communication would be an appropriate way for SBS Entities to discharge their obligations with respect to daily marks.[410]

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[396] *See* Section II.C., *supra.*

[397] *See* SIFMA (August 2015), *supra* note 5 (requesting that the Commission insert additional required disclosures into Rule 15h–3(c) to ensure a fair and balanced communication).

[398] *See* Section II.G.5, *infra.*

[399] *See* Levin, *supra* note 5; and IDC, *supra* note 5.

[400] *Id.*

[401] *See* IDC, *supra* note 5.

[402] *See* Proposing Release, 76 FR at 42412, *supra* note 3.

[403] *See* Levin, *supra* note 5.

[404] *See* SIFMA (August 2015), *supra* note 5.

[405] Suggestions include: Requiring interfaces that allow the counterparty to initiate, track and close valuation disputes; a method of communication designed to protect the confidentiality of the data and prevent any unintentional or fraudulent addition, modification or deletion of a valuation record; or require the use of a secure Web site or electronic platform. *See* Markit, *supra* note 5; IDC, *supra* note 5.

[406] *See* IDC, *supra* note 5.

[407] *See* Markit, *supra* note 5.

One commenter suggested that we require an SBS Entity to have policies and procedures to reasonably ensure the safety and security of non-electronic means of communication.[411] To provide SBS Entities with flexibility in the manner of disclosure, we have not specified requirements with respect to the safety and security of either electronic or non-electronic communication of the daily mark.[412]

In the Proposing Release, the Commission stated that the daily mark for both cleared and uncleared security-based swaps should be provided without charge and with no restrictions on internal use by the counterparty, although restrictions on dissemination to third parties are permissible.[413] One commenter supported the requirement that the daily mark disclosure be provided free of charge.[414] The daily mark disclosures are relevant to a counterparty's ongoing understanding and management of its security-based swap positions. We believe that counterparties to whom the SBS Entity provides the daily mark should have the opportunity to effectively use, retain, and analyze the information with respect to such management. Therefore, the Commission continues to believe that effective access to the daily mark information is necessary to ensure a counterparty's ability to manage its security-based swap positions over the life of the security-based swaps. Charging for provision of the daily mark, or allowing restrictions on the internal use of the daily mark by the counterparty with respect to managing their security-based swap positions, could undermine this objective. Thus, the Commission continues to believe that the daily mark for both cleared and uncleared security-based swaps should be provided without charge and with no restrictions on internal use by the counterparty, although restrictions on dissemination to third parties are permissible.[415] Accordingly, the Commission has included these requirements in a new paragraph (3) to Rule 15Fh–3(c), as adopted.

f. Clearing Rights

Section 15F(h)(1)(D) of the Exchange Act authorizes the Commission to prescribe business conduct standards that relate to "such other matters as the Commission determines to be appropriate." [416] When an SBS Entity enters into a security-based swap with a counterparty that is not an SBS Entity or a Swap Entity, Section 3C(g) of the Exchange Act establishes a right for the counterparty: (i) To select the clearing agency at which the security-based swap will be cleared, if the security-based swap is subject to the mandatory clearing requirement under Section 3C(a);[417] and (ii) to elect to require the clearing of the security-based swap, and to select the clearing agency at which the security-based swap will be cleared, if the security-based swap is not subject to the mandatory clearing requirement.[418]

i. Proposed Rule

Proposed Rule 15Fh–3(d) would require an SBS Entity, before entering into a security-based swap with a counterparty, other than an SBS Entity or Swap Entity, to disclose to the counterparty its rights under Section 3C(g) of the Exchange Act concerning submission of a security-based swap to a clearing agency for clearing. The counterparty's rights, and thus the proposed disclosure obligations, would differ depending on whether the clearing requirement of Section 3C(a) applies to the relevant transaction.[419]

When the clearing requirements of Section 3C(a) apply to a security-based swap, proposed Rule 15Fh–3(d)(1)(i) would require the SBS Entity to disclose to the counterparty the clearing agencies that accept the security-based swap for clearing and through which of those clearing agencies the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap. Under proposed Rule 15Fh–3(d)(1)(ii), the SBS Entity would also be required to notify the counterparty of the counterparty's sole right to select which clearing agency is to be used to clear the security-based swap, provided it is a clearing agency at which the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap.

For security-based swaps that are not subject to the clearing requirement under Exchange Act Section 3C(a), proposed Rule 15Fh–3(d)(2) would require the SBS Entity to determine whether the security-based swap is accepted for clearing by one or more clearing agencies and, if so, to disclose to the counterparty the counterparty's right to elect clearing of the security-based swap. Proposed Rule 15Fh–3(d)(2)(ii) would require the SBS Entity to disclose to the counterparty the clearing agencies that accept the security-based swap for clearing and whether the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap through such clearing agencies. Proposed Rule 15Fh–3(d)(2)(iii) would require the SBS Entity to notify the counterparty of the counterparty's sole right to select the clearing agency at which the security-based swap would be cleared, provided it is a clearing agency at which the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap.

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[408] *Id.*

[409] *Id.*

[410] *See* Proposing Release, 76 FR at 42412, *supra* note 3.

[411] *See* Markit, *supra* note 5.

[412] *See* the discussion of Timing and Manner of Certain Disclosures above in Section II.G.2.b. SBS Entities have to comply with their obligations under Section 15F(j) and Rule 15Fh–3(h). In addition, as a practical matter, we believe SBS Entities are likely to have such policies and procedures with respect to both electronic and non-electronic means of communication in the course of prudent business practices.

[413] *See* Proposing Release, 76 FR at 42412, *supra* note 3.

[414] *See* IDC, *supra* note 5.

[415] For these purposes, providing the daily mark to a third party that is the agent of the counterparty, such as the independent representative of a special entity, for use consistent with its duties to the client, generally should be considered internal use.

[416] 15 U.S.C. 78o–10(h)(1)(D).

[417] *See* Exchange Act 3C(g)(5)(A), 15 U.S.C. 78c–3(g)(5)(A): With respect to any security-based swap that is subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

[418] *See* Exchange Act Section 3C(g)(5)(B), 15 U.S.C. 78c–3(g)(5)(B): With respect to any security-based swap that is not subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty—(i) may elect to require clearing of the security-based swap; and (ii) shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

[419] Section 3C(a)(1) of the Exchange Act provides that: "[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared." 15 U.S.C. 78c–3(a)(1).

ii. Comments on Proposed Rule

Four commenters addressed the required disclosure regarding clearing rights.[420] One commenter requested confirmation that a counterparty's clearing elections could affect the price of the security-based swap so long as this is disclosed to the counterparty at the time of the other disclosures regarding clearing.[421] Additionally, the commenter asked for clarification that standardized disclosure could be used to satisfy this requirement.[422] Another commenter recommended that the Commission not impose the clearing rights disclosure requirement on Major SBS Participants transacting with counterparties at arm's length, or alternatively, that the Commission allow ECP counterparties to opt out of receiving such disclosures.[423]

An additional commenter advocated for harmonizing the clearing rights disclosure requirement with the CFTC's parallel requirement.[424] Specifically, the commenter recommended eliminating the proposed requirements to disclose the names of the clearing agencies that accept the security-based swap for clearing, and through which the SBS Entity is authorized to clear the security-based swap.[425] The commenter argued that given the limited number of security-based swap clearing agencies, such additional disclosure is unlikely to be necessary, and that the Commission could always require it at a future date if the number increases.[426] Additionally, as discussed in Section II.B, the commenter advocated for adding an exception to the requirements regarding the disclosure of clearing rights to include security-based swaps that are intended to be cleared and that are either (1) executed on a registered national securities exchange or registered or exempt SEF and required to be cleared pursuant to Section 3C of the Exchange Act, or (2) anonymous.[427]

iii. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(d) largely as proposed, but with modifications. First, as discussed above in Section II.B, we are limiting an SBS Entity's disclosure obligations regarding clearing rights pursuant to Rule 15Fh–3(d) to counterparties whose identity is known to the SBS Entity at a reasonably sufficient time prior to the execution of the transaction.

The Commission is also making a second modification to the proposed rule. We also added the phrase "subject to Section 3C(g)(5) of the Act," to Rule 15Fh–3(d)(1)(ii) to clarify the source of the counterparty's right to select which of the clearing agencies described in paragraph (d)(1)(i) shall be used to clear the security-based swap.

A commenter suggested that, due to the limited number of security-based swap clearing agencies, disclosure of clearing agencies by name was unnecessary.[428] Regardless of the current limited number of clearing agencies for security-based swaps, not every security-based swap will be accepted for clearing at every clearing agency, so the Commission believes that it is still useful for the counterparty to know whether the particular security-based swap is able to be cleared at a particular clearing agency.

Rule 15Fh–3(d) requires that disclosure be made before a transaction occurs. As noted in the Proposing Release, the Commission believes that it would be appropriate for a counterparty to exercise its statutory right to select the clearing agency at which its security-based swaps will be cleared on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions the counterparty may execute with the SBS Entity.[429] While Rule 15Fh–3(d) does not require an SBS Entity to become a member or participant of a specific clearing agency, an SBS Entity could not enter into security-based swaps that are subject to a mandatory clearing requirement without having some arrangement in place to clear the transaction.[430]

Consistent with the discussion regarding manner of disclosures above in Section II.G.2.b, the Commission agrees with the commenter that SBS Entities could use standardized disclosure to satisfy Rule 15Fh–3(d).

The Commission also recognizes that a counterparty's clearing elections could affect the price of the security-based swap and recognizes that counterparties may wish to receive disclosures about the effect of clearing on the price. Although the rule does not explicitly require that the SBS Entity provide specific disclosures regarding the effect of clearing on the price of the security-based swap, the SBS Entity may wish to consider whether their obligations under Rule 15Fh–3(b)(1) to disclose the material risks and characteristics of the particular security-based swap, as well as their obligation pursuant to Rule 15Fh–3(g) to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith (including providing a sound basis for evaluating the facts with regard to any particular security-based swap or trading strategy involving a security-based swap) may require such disclosure given their particular facts and circumstances.

One commenter recommended that the Commission not impose the clearing rights disclosure requirement on Major SBS Participants transacting with counterparties at arm's length or as an alternative allow ECP counterparties to opt out of receiving the clearing rights disclosure.[431] As explained in the Proposing Release, the required disclosure is intended to promote that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market are cleared through a regulated clearing agency.[432] The Commission has considered the concerns raised by commenters and determined that it is appropriate to require Major SBS Participants to provide such disclosures, and to not to permit counterparties to opt out of the protections provided by the business conduct rules. We believe that the benefits of Rule 15Fh–3(d), as discussed above, would inure equally to counterparties that transact with SBS Dealers as well as those that transact with Major SBS Participants.[433] We further believe that allowing counterparties to effectively opt out of the rule would deprive them of the express protections that the rules were intended to provide. As a result, we are not adopting the commenters' suggestions to allow counterparties to opt out of the clearing rights disclosure requirement when transacting with a Major SBS Participant nor to exclude Major SBS Participants from the requirement of providing the clearing rights disclosure at this time.

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[420] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; MFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[421] *See* FIA/ISDA/SIFMA, *supra* note 5.

[422] *Id.*

[423] *See* MFA, *supra* note 5.

[424] *See* SIFMA (August 2015), *supra* note 5.

[425] *Id.*

[426] *Id.*

[427] *Id.*

[428] *See* SIFMA (August 2015), *supra* note 5.

[429] *See* Proposing Release, 76 FR at 42413, *supra* note 3.

[430] *See* Section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c–3(a)(1).

[431] *See* MFA, *supra* note 5.

[432] *See* MFA, *supra* note 5; Proposing Release 76 FR at 42413, *supra* note 3.

[433] *See* Section II.C above.

3. Know Your Counterparty

Section 15F(h)(1)(D) of the Exchange Act authorizes the Commission to prescribe business conduct standards that relate to "such other matters as the Commission determines to be appropriate."[434]

a. Proposed Rule

Proposed Rule 15Fh–3(e) would establish a "know your counterparty" requirement under which an SBS Dealer would be required to establish, maintain and enforce policies and procedures reasonably designed to obtain and retain a record of the essential facts that are necessary for conducting business with each counterparty that is known to the SBS Dealer. For purposes of the proposed rule, "essential facts" would be defined as: (i) Facts required to comply with applicable laws, regulations and rules; (ii) facts required to implement the SBS Dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; (iii) information regarding the authority of any person acting for such counterparty; and (iv) if the counterparty is a special entity, such background information regarding the independent representative as the SBS Dealer reasonably deems appropriate.[435]

b. Comments on the Proposed Rule

Four commenters addressed the proposed know your counterparty requirement.[436] Two commenters generally supported the proposed rule.[437] However, one requested clarification that since the requirement only applies to "known" counterparties, it would not apply to an SBS Dealer transacting on a SEF or other electronic execution platform where such SBS Dealer only learns the identity of the counterparty immediately before the execution and must execute the transaction within a limited time frame after learning the counterparty's identity.[438] The other commenter asserted that the requirement should apply to Major SBS Participants in addition to SBS Dealers.[439]

A third commenter expressed concern that the proposed rule would inappropriately empower SBS Dealers to adopt and enforce rules and to collect information about independent representatives.[440] The commenter asserted that the use of the word "enforce" in the proposed rule suggests that the rule would improperly empower SBS Dealers to adopt policies and procedures that have the force of law with respect to their counterparties.[441] Specifically, the commenter asserted that the proposed rule authorizes SBS Dealers to collect unlimited information about the representatives of special entities, as well as proprietary information, which would give dealers an unfair competitive advantage.[442] The commenter argued that SBS Dealers should be required to adopt policies that comply with the law, and that these policies should not be binding to the extent they require more than the law requires.[443]

A fourth commenter recommended eliminating the proposed requirement to collect background information regarding the independent representative of a special entity.[444] First, the commenter asserted that this change would harmonize the Commission's rule with the parallel CFTC requirement.[445] Second, the commenter stated that the proposed requirement would be duplicative of the requirements imposed on SBS Entities acting as counterparties to special entities pursuant to Rule 15Fh–5.[446] Additionally, as discussed in Section II.B, the commenter advocated for adding an exception to the know your counterparty requirement to cover security-based swaps that are intended to be cleared, executed on a registered national securities exchange or registered or exempt SEF, and of a type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Exchange Act.[447]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(e) with two modifications. First, in response to a specific suggestion from a commenter,[448] the Commission is eliminating the proposed requirement that an SBS Dealer obtain background information regarding the independent representative of a special entity counterparty, as the SBS Dealer reasonably deems appropriate. The Commission agrees with the commenter that the proposed requirement would have been duplicative of the requirements imposed on SBS Entities acting as counterparties to special entities pursuant to Rule 15Fh–5 (discussed below in Section II.H).

Second, the Commission is adding the word "written" before policies and procedures in the rule text to clarify that the policies and procedures required by the rule must be written. The Commission believes that this change clarifies the proposal and reflects the requirement in Rule 15Fh–3(h), discussed in Section II.G.6 below, that an SBS Dealer establish, maintain and enforce written policies and procedures that are reasonably designed to prevent violations of the applicable federal securities laws and rules and regulations thereunder. Thus, as adopted, Rule 15Fh–3(e) requires SBS Dealers to "establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty."

In response to concerns raised by a commenter,[449] the Commission is clarifying that the provision stating that an SBS Dealer shall "establish, maintain and enforce" policies and procedures does not vest such policies and procedures with force of law with respect to their counterparties. An SBS Dealer would, however, have an obligation to enforce (*i.e.,* follow) its internal policies and procedures.

We have determined, as proposed, not to apply the rule where an SBS Dealer does not know the identity of its counterparty. We are not adopting the suggestion of one commenter that we provide an additional exception to cover security-based swaps that are intended to be cleared, executed on a registered national securities exchange or registered or exempt SEF, and of a type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Exchange Act, even if not anonymous.[450] However, we note that Rule 15Fh–3(e) requires SBS Dealers to establish policies and procedures that are "reasonably designed to obtain and retain a record of the essential facts concerning each

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[434] 15 U.S.C. 78o–10(h)(1)(D).

[435] Proposed Rule 15Fh–3(e)(1)–(4).

[436] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; ABC, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[437] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[438] *See* FIA/ISDA/SIFMA, *supra* note 5.

[439] *See* CFA, *supra* note 5.

[440] *See* ABC, *supra* note 5.

[441] *Id.*

[442] *Id.*

[443] *Id.*

[444] *See* SIFMA (August 2015), *supra* note 5.

[445] *Id.*

[446] *Id.*

[447] *Id.*

[448] *See* SIFMA (August 2015), *supra* note 5.

[449] *See* ABC, *supra* note 5.

[450] *See* SIFMA (August 2015), *supra* note 5.

[known counterparty] that are necessary for conducting business with such counterparty." Reasonably designed policies and procedures established pursuant to Rule 15Fh–3(e) may address situations in which there are few, if any, essential facts that are necessary for conducting business with a counterparty. For example, if the only security-based swaps that an SBS Dealer enters into with a counterparty are intended to be cleared security-based swaps that are executed on a registered exchange or SEF and of a type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Exchange Act, then there may be few, if any, essential facts that the SBS Dealer needs to know about such counterparty in that circumstance.

In response to a commenter's request for clarification that since the requirement only applies to "known" counterparties, it would not apply to an SBS Dealer transacting on a SEF or other electronic execution platform where such SBS Dealer only learns the identity of the counterparty immediately before the execution and must execute the transaction within a limited time frame after learning the counterparty's identity,[451] the Commission notes that Rule 15Fh–3(e) does not contain a specific timing requirement. Rule 15Fh–3(e) requires SBS Dealers to establish policies and procedures that are "reasonably designed to obtain and retain a record of the essential facts concerning each [known counterparty] that are necessary for conducting business with such counterparty." To be "reasonably designed" such policies and procedures generally should provide for the collection of counterparty information prior to execution of a transaction with that counterparty. However, if the SBS Dealer does not learn a counterparty's identity until immediately prior to or subsequent to execution, then it would be reasonable for collection to occur within a reasonable time after the SBS Dealer learns the identity of the counterparty.[452]

As noted in the Proposing Release, the "know your counterparty" obligations under Rule 15Fh–3(e) are a modified version of the "know your customer" obligations imposed on other market professionals, such as broker-dealers, when dealing with customers.[453] Although the statute does not require the Commission to adopt a "know your counterparty" standard, the Commission continues to believe that such a standard is consistent with basic principles of legal and regulatory compliance, and operational and credit risk management.[454] Further, the Commission continues to believe that entities that currently operate as SBS Dealers typically would already have in place, as a matter of their normal business practices, policies and procedures that could potentially satisfy the requirements of the rule.[455]

The Commission is applying the requirements in Rule 15Fh–3(e) to SBS Dealers but declines to apply them to Major SBS Participants, as suggested by a commenter.[456] As discussed above in Section II.C, the Commission has determined that where a business conduct requirement is not expressly addressed by the Dodd-Frank Act, the rules generally will not apply to Major SBS Participants.

4. Recommendations by SBS Dealers

Section 15F(h)(1)(D) of the Exchange Act authorizes the Commission to prescribe business conduct standards that relate to "such other matters as the Commission determines to be appropriate."[457] Additionally, Section 15F(h)(3)(D) of the Exchange authorizes the Commission to establish "such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act."[458]

a. Proposed Rule

i. General

Proposed Rule 15Fh–3(f) generally would require an SBS Dealer that recommends a security-based swap or trading strategy involving a security-based swap to a counterparty, other than an SBS Entity or Swap Entity, to have a reasonable basis for believing that the recommended security-based swap or trading strategy is suitable. Specifically, proposed Rule 15Fh–3(f)(1)(i) would require an SBS Dealer to have a reasonable basis to believe, based on reasonable diligence, that the recommended security-based swap or trading strategy is suitable for at least some counterparties. Additionally, proposed Rule 15Fh–3(f)(1)(ii) would require an SBS Dealer to have a reasonable basis to believe that the recommended security-based swap or trading strategy is suitable for the particular counterparty that is the recipient of the SBS Dealer's recommendation ("customer-specific suitability"). Under proposed Rule 15Fh–3(f)(1)(ii), to establish a reasonable basis to believe that a recommendation is suitable for a particular counterparty, an SBS Dealer would need to have or obtain relevant information regarding the counterparty, including the counterparty's investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy.

ii. Institutional Suitability Alternative

Proposed Rule 15Fh–3(f)(2) would provide an alternative to the general suitability requirements, under which an SBS Dealer could fulfill its suitability obligations with respect to a particular counterparty if: (1) The SBS Dealer reasonably determines that the counterparty (or its agent) is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy involving a security-based swap; (2) the counterparty (or its agent) affirmatively represents in writing that it is exercising independent judgment in evaluating the recommendations by the SBS Dealer; and (3) the SBS Dealer discloses that it is acting in the capacity of a counterparty, and is not undertaking to assess the suitability of the security-based swap or trading strategy for the counterparty.

The Commission sought comment on whether different categories of ECPs should be treated differently for purposes of suitability determinations.[459] The Proposing Release noted that, under our proposed rules, an SBS Dealer could rely on the institutional suitability alternative when entering into security-based swaps with any person that qualified as an ECP, a category that includes persons with $5 million or more invested on a discretionary basis that enter into the security-based swap "to manage risks." [460] In contrast, under FINRA rules, in order to apply an analogous institutional suitability alternative, a broker-dealer must be dealing with a person (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.[461] The Proposing Release asked whether the Commission should apply a different standard of suitability depending on whether the counterparty would be protected as a retail investor under FINRA rules when the SBS Dealer is also a registered broker-dealer.[462] More generally, the Commission sought comment on whether the institutional suitability alternative available under proposed Rule 15Fh–3(f)(2) should be limited to counterparties that would not be protected as retail investors under FINRA rules or another category of counterparties.

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[451] *See* FIA/ISDA/SIFMA, *supra* note 5.

[452] The application of the know your counterparty requirement in these circumstances does not affect the application of the other business conduct obligations in Rules 15Fh–3(b) and (d), 15Fh–4(b), 15Fh–5, and 15Fh–6, including the exceptions to the application of those rules where the identity of the counterparty is not known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction, and, in the case of Rules 15Fh–4(b), 15Fh–5 and 15Fh–6, executed on a registered national securities exchange or registered or exempt SEF.

[453] *See* Proposing Release, 76 FR at 42414, *supra* note 3. *Cf.* FINRA Rule 2090 ("[e]very member shall use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer"). Supplementary Material .01 to FINRA Rule 2090 defines the "essential facts" for purposes of the FINRA rule to include certain information not required by Rule 15Fh–3(e). For purposes of FINRA Rule 2090, facts "essential" to "knowing the customer" are those required to (a) effectively service the customer's account, (b) act in accordance with any special handling instructions for the account, (c) understand the authority of each person acting on behalf of the customer, and (d) comply with applicable laws, regulations, and rules.

[454] *See* Proposing Release, 76 FR at 42414, *supra* note 3.

[455] *Id.*

[456] *See* CFA, *supra* note 5.

[457] 15 U.S.C. 78o–10(h)(1)(D).

[458] 15 U.S.C. 78o–10(h)(3)(D).

iii. Special Entity Suitability Alternative

Proposed Rule 15Fh–3(f)(3) would provide another alternative to the general suitability requirements for SBS Dealers transacting with special entity counterparties. Under proposed Rule 15Fh–3(f)(3), an SBS Dealer would be deemed to satisfy its suitability obligations with respect to a special entity counterparty if the SBS Dealer either is acting as an advisor to the special entity and complies with proposed Rule 15Fh–4(b),[463] or is deemed not to be acting as an advisor to the special entity pursuant to proposed Rule 15Fh–2(a).

b. Comments on the Proposed Rule

i. General

Six commenters addressed the suitability requirements.[464] Three commenters recommended expanding the suitability requirements.[465] One commenter suggested two changes to the rule: (1) Clarifying that SBS Dealers would be prohibited from recommending to investors financial products that the dealers believe will fail; and (2) requiring that an SBS Dealer making recommendations regarding a certain product or type of product have the background necessary to understand the product.[466] Another commenter urged the Commission to consider developing suitability standards for the types of financial products that can be sold to state and local governments, including those products in the swaps arena.[467] A third commenter suggested that the Commission conform its requirements to the CFTC's proposal, noting that the CFTC proposal would have required the dealer to obtain information through reasonable due diligence concerning the counterparty's financial situation and needs, objectives, tax status, ability to evaluate the recommendation, liquidity needs, risk tolerance or other relevant information.[468] The commenter also recommended explicitly requiring SBS Dealers to: (1) Gather information sufficient to make the suitability assessment; and (2) maintain sufficient documents to allow the Commission to effectively enforce compliance.[469] Additionally, the commenter asserted that the suitability requirement should apply to all SBS Entities, not just SBS Dealers, noting that the suitability obligation would only be imposed on a Major SBS Participant if the Major SBS Participant makes a recommendation to a non-SBS Entity.[470] While the commenter supported the exclusion from the suitability requirement for recommendations to other SBS Entities, it strongly opposed any additional exclusions (*e.g.,* for recommendations to broker-dealers or other market intermediaries who are not SBS Entities). Finally, the commenter also strongly opposed limiting the requirement to recommendations to retail investors.[471]

Two other commenters recommended narrowing the suitability requirements.[472] One commenter suggested that any suitability standard for SBS Dealers be applied at the least granular level (*e.g.,* on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions between the parties, as appropriate).[473] The second commenter opposed the suitability requirement more broadly, stating that Congress did not impose such a requirement.[474] The commenter suggested, as an alternative to the proposed rule, that any suitability requirement for recommendations to counterparties other than special entities be imposed through a requirement to adopt and enforce policies and procedures reasonably designed to assess the suitability of recommendations, and that the proposed rule be incorporated as guidance establishing a safe harbor for whether an SBS Dealer's policies are reasonable.[475] The commenter also asserted that the proposed rule could conflict with the specific suitability rules of other (unidentified) regulators, and accordingly, urged the Commission to clarify that an SBS Dealer that complies with suitability requirements of another qualifying regulator will also be deemed to have adopted and enforced reasonable suitability policies under the Commission's rule.[476] Finally, the commenter recommended allowing sophisticated counterparties to opt out of suitability protection, noting that some counterparties will find the suitability analysis burdensome and intrusive, and that the costs of the proposed suitability rule for those counterparties will likely outweigh any benefits.[477]

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[459] *See* Proposing Release, 76 FR at 42417, *supra* note 3.

[460] *See* Section 1a(18)(A)(xi) of the Commodity Exchange Act, 7 U.S.C. 1a(18)(A)(xi).

[461] *See* FINRA Rule 2111(b) (referring to FINRA Rule 4512(c)).

[462] Under FINRA rules, institutional suitability is limited to transactions with so-called "institutional" investors:

(1) A bank, savings and loan association, insurance company or registered investment company;

(2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or

(3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

See FINRA Rule 4512(c) (regarding definition of "institutional account").

[463] As discussed below in Section II.H.2, proposed Rule 15Fh–4(b) would impose certain requirements on SBS Dealers acting as advisors to special entities.

[464] *See* Levin, *supra* note 5; GFOA, *supra* note 5; CFA, *supra* note 5; Barnard, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[465] *See* Levin, *supra* note 5; GFOA, *supra* note 5; CFA, *supra* note 5.

[466] *See* Levin, *supra* note 5.

[467] *See* GFOA, *supra* note 5.

[468] *See* CFA, *supra* note 5. The CFTC subsequently adopted a rule that is similar to proposed Rule 15Fh–3(f). *See* CFTC Adopting Release, 77 FR at 9771–9774, *supra* note 21.

[469] *See* CFA, *supra* note 5.

[470] *Id.*

[471] *Id.* The commenter explained that, under the institutional suitability alternative, "the SBS Dealer wouldn't even have to have a reasonable basis to believe that the swap was suitable . . . for the particular counterparty to the transaction." The commenter expressed its concern that:

> Given the profits at stake, SBS Dealer will have strong incentives to conclude that the counterparty is capable of evaluating the transaction. Counterparties who turn to the derivatives markets out of questionable motives will have equally strong incentives to assert their capacity to independently evaluate investment risk. And even those with purer motives may be reluctant to confess to a lack of expertise.

[472] *See* Barnard, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[473] *See* Barnard, *supra* note 5.

[474] *See* FIA/ISDA/SIFMA, *supra* note 5.

[475] *Id.*

[476] *Id.*

Finally, a sixth commenter advocated for harmonizing the suitability requirement in proposed Rule 15Fh–3(f)(1)(i) with the CFTC's parallel requirement.[478] Specifically, the commenter recommended changing the wording of the suitability requirement in proposed Rule 15Fh–3(f)(1)(i) to "undertake reasonable diligence to understand the potential risks and rewards associated with the recommended security-based swap or trading strategy involving a security-based swap." [479]

ii. Institutional Suitability Alternative

Three commenters submitted comments regarding the institutional suitability alternative in proposed Rule 15Fh–3(f)(2).[480] Two commenters expressed concerns regarding the proposed alternative.[481] One commenter expressed concern that the counterparty representations upon which the SBS Dealer would rely may become outdated or boilerplate language that is inappropriate for the counterparty to which it is directed.[482] Accordingly, the commenter suggested requiring SBS Dealers to conduct routine audits to ensure that these institutional level suitability determinations are not over-utilized, that they are appropriate for the particular counterparties involved, and that the appropriate written documentation was provided and signed in applicable transactions.[483] Additionally, the commenter recommended that as part of that audit process, and to prevent inaccurate determinations, SBS Dealers should be required to test, perhaps on an annual basis, whether counterparties continue to have the personnel and expertise needed to conduct independent evaluations of the security-based swap products being marketed.[484]

The second commenter strongly opposed the institutional suitability alternative, asserting that the complexity and opacity of structured finance products has made them impenetrable to all but the most sophisticated industry experts.[485] At a minimum, the commenter recommended that if the Commission adopts the institutional suitability alternative, it should require an SBS Dealer to have a reasonable basis to believe its counterparty has the capacity to absorb potential losses related to the security-based swap or trading strategy being recommended.[486]

A third commenter advocated for harmonizing the institutional suitability alternative with the CFTC's parallel provision, citing potential counterparty confusion.[487] Specifically, the commenter recommended that the Commission: (1) Clarify that the institutional suitability alternative only satisfies an SBS Dealer's customer-specific suitability obligation in proposed Rule 15Fh–3(f)(1)(ii), not its suitability obligation in proposed Rule 15Fh–3(f)(1)(i); and (2) add a safe harbor providing that an SBS Dealer can satisfy its requirement to make a reasonable determination that the counterparty is capable of independently evaluating investment risks with regard to the security-based swap if the SBS Dealer receives written representations from the counterparty regarding the counterparty's compliance with appropriate policies and procedures.[488]

iii. Special Entity Suitability Alternative

Four commenters submitted comments regarding the suitability alternative for special entity counterparties in proposed Rule 15Fh–3(f)(3).[489] Three commenters supported the proposed rule.[490] Another commenter recommended adding a requirement to the institutional suitability alternative, in lieu of the special entity suitability alternative, that the SBS Dealer comply with the requirements of Rule 15Fh–4(b) (regarding acting as an advisor to a special entity) if the SBS Dealer's recommendation to a special entity would cause it to be acting as an advisor to the special entity.[491]

c. Response to Comments and Final Rule

i. General

After considering the comments, the Commission is adopting Rule 15Fh–3(f)(1) with two modifications. The first modification is to rephrase the suitability obligation in proposed Rule 15Fh–3(f)(1)(i), in response to a specific suggestion from a commenter,[492] to make it consistent with the CFTC's parallel suitability requirement in Commodity Exchange Act Rule 23.434(a)(1), which explicitly requires SBS Dealers to understand the risk-reward tradeoff of their recommendations. We believe that our proposed formulation and the CFTC's formulation would have achieved the same purpose. However, to alleviate concerns among commenters that compliance with the two rules would require anything different, we are harmonizing the wording of our rule with the CFTC's parallel suitability obligation.[493] As adopted, Rule 15Fh–3(f)(1)(i) requires an SBS Dealer that recommends a security-based swap or trading strategy involving a security-based swap to a counterparty, other than an SBS Entity or Swap Entity, to "undertake reasonable diligence to understand the potential risks and rewards associated with the recommended security-based swap or trading strategy involving a security-based swap." Consistency with the CFTC standard will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard. Consistent wording will also allow SBS Entities to more easily analyze compliance with the Commission's rule against their existing activities to comply with the CFTC's parallel suitability rule for Swap Entities.

The second modification the Commission is making is to add the phrase "involving a security-based swap" to the final line of the customer-specific suitability obligation in proposed Rule 15Fh–3(f)(1)(ii) to modify "trading strategy." Accordingly, Rule 15Fh–3(f)(1)(ii), as adopted, requires an SBS Dealer that recommends a security-based swap or trading strategy involving a security-based swap to a counterparty, other than an SBS Entity or Swap Entity, to have a reasonable basis to believe that a recommended security-based swap or trading strategy involving a security-based swap is suitable for the counterparty, and to establish a reasonable basis for a recommendation, to have or obtain relevant information regarding the counterparty, including the counterparty's investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy "involving a security-based swap." The Commission does not believe that this is a substantive change. It simply clarifies that the term trading strategy as used in the final line of the rule is the same as recommended trading strategy involving a security-based swap that is referenced earlier in the rule.

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[477] *Id.*

[478] *See* SIFMA (August 2015), *supra* note 5.

[479] *Id.*

[480] *See* Levin, *supra* note 5; CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[481] *See* Levin, *supra* note 5; CFA, *supra* note 5.

[482] *See* Levin, *supra* note 5.

[483] *Id.*

[484] *Id.*

[485] *See* CFA, *supra* note 5.

[486] *Id.*

[487] *See* SIFMA (August 2015), *supra* note 5.

[488] *Id.*

[489] *See* BlackRock, *supra* note 5; GFOA, *supra* note 5; ABC, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[490] *See* BlackRock, *supra* note 5; GFOA, *supra* note 5; ABC, *supra* note 5.

[491] *See* SIFMA (August 2015), *supra* note 5.

[492] *See* SIFMA (August 2015), *supra* note 5. The Commission believes this change also responds to another commenter's concern that the proposed rules could conflict with the CFTC's suitability rule. *See* FIA/ISDA/SIFMA, *supra* note 5.

[493] *See* CFTC Adopting Release, 77 FR at 9771–9774, *supra* note 21. The new formulation is also consistent with FINRA's approach to this aspect of suitability. *See* Supplementary Material .05(a) to FINRA Rule 2111 (effective July 9, 2012) ("[a] member's or associated person's reasonable diligence must provide the member or associated person with an understanding of the potential risks and rewards associated with the recommended security or strategy").

As noted in the Proposing Release, although suitability is not expressly addressed in Section 15F(h) of the Exchange Act, the obligation to make only suitable recommendations is a core business conduct requirement for broker-dealers and other financial intermediaries.[494] Municipal securities dealers also have a suitability obligation when recommending municipal securities transactions to a customer.[495] Depending on the scope of its activities, an SBS Dealer may be subject to one of these other suitability obligations, in addition to those under Rule 15Fh–3(f). In particular, an SBS Dealer that also is a registered broker-dealer and a FINRA member, would be subject to FINRA's suitability requirements in connection with the recommendation of a security-based swap or trading strategy involving a security-based swap.[496] Rule 15Fh–3(f) is intended to ensure that all SBS Dealers that make recommendations are subject to this obligation, tailored as appropriate in light of the nature of the security-based swap markets.[497]

The Commission continues to believe that the determination of whether an SBS Dealer has made a recommendation that triggers suitability obligations should turn on the facts and circumstances of the particular situation and, therefore, whether a recommendation has taken place is not susceptible to a bright line definition.[498] This follows the FINRA approach to what constitutes a recommendation for purposes of FINRA's suitability rule.[499] In the context of the FINRA suitability rule, factors considered in determining whether a recommendation has taken place include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities." [500] We note that this could include a call to action regarding buying, selling, materially amending or early termination of a security-based swap. The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation." The Commission continues to believe that this approach to determining whether a recommendation has taken place should apply in the context of Rule 15Fh–3(f) as well.[501]

As noted in the Proposing Release, an SBS Dealer typically would not be deemed to be making a recommendation solely by reason of providing general financial or market information, or transaction terms in response to a request for competitive bids.[502] Again, this follows the FINRA approach to determining whether a recommendation has occurred.[503] Furthermore, compliance with the requirements of the other business conduct rules, in particular, Rules 15Fh–3(a) (verification of counterparty status), 15Fh–3(b) (disclosures of material risks and characteristics, and material incentives or conflicts of interest), 15Fh–3(c) (disclosures of daily mark), and 15Fh–3(d) (disclosures regarding clearing rights) would not, in and of itself, result in an SBS Dealer being deemed to be making a "recommendation." [504]

We believe that the suitability obligation in Rule 15Fh–3(f)(1)(i) should address one commenter's concerns about the possibility that an SBS Dealer will recommend a financial product that it believes will fail or that it does not have the necessary background to understand.[505] When making recommendations, SBS Dealers are always required to meet their suitability obligation in Rule 15Fh–3(f)(1)(i), regardless of whether they avail themselves of the institutional suitability alternative to meet their customer-specific suitability obligations. In that respect, SBS Dealers will always be required to undertake reasonable diligence to understand the risks and rewards behind any recommended security-based swap.

With respect to another commenter's concerns about SBS Dealers' gathering sufficient information to make the customer-specific suitability assessment,[506] the Commission notes that Rule 15Fh–3(f)(1)(ii) requires an SBS Dealer to "have a reasonable basis to believe" that a recommended security-based swap or trading strategy is suitable for the counterparty. To establish that reasonable basis, the rule requires the SBS Dealer to "have or obtain relevant information regarding the counterparty, including the counterparty's investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy." The list of "relevant information" in the rule is exemplary, not exhaustive. Whether an SBS Dealer has a reasonable basis to believe that a recommended security-based swap or trading strategy is suitable for the counterparty is a determination that depends on the facts and circumstances of the particular situation.

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[494] *See* Proposing Release, 76 FR at 42415, *supra* note 3. *See also, e.g.,* FINRA Rules 2090 and 2111 (effective Jul. 9, 2012); *Charles Hughes & Co.* v. *SEC,* 139 F.2d 434 (2d Cir. 1943) (enforcing suitability obligations under the antifraud provisions of the Exchange Act).

[495] MSRB Rule G–19(c) provides that:

> In recommending to a customer any municipal security transaction, a broker, dealer, or municipal securities dealer shall have reasonable grounds: (i) Based upon information available from the issuer of the security or otherwise, and (ii) based upon the facts disclosed by such customer or otherwise known about such customer, for believing that the recommendation is suitable.

[496] *See* FINRA Rule 2111. Under FINRA rules, unless a customer is an "institutional account" that meets the requirements of the institutional account exemption, he or she would be entitled to the protections provided by retail suitability obligations in the broker-dealer context. An "institutional account" means the account of a bank, savings and loan association, insurance company, registered investment company, registered investment adviser or any other person (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million. *See* FINRA Rule 2111(b) (referring to FINRA Rule 4512(c)).

[497] Some dealers have indicated that they already apply "institutional suitability" principles to their swap business. *See, e.g.,* Letter from Richard Ostrander, Managing Director and Counsel, Morgan Stanley, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, and David A. Stawick, Secretary, Commodity Futures Trading Commission (Dec. 3, 2010) at 5; Report of the Business Standards Committee, Goldman Sachs (Jan. 2011), *http://www2.goldmansachs.com/our-firm/business-standards-committee/report.pdf.*

[498] *See* Proposing Release, 76 FR at 42415, *supra* note 3.

[499] *See* FINRA Regulatory Notice 12–25 (May 2012) Q.2 and Q.3 (regarding the scope of "recommendation").

[500] *See* FINRA Notice to Members 01–23 (Mar. 19, 2001), and Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718 (Aug. 13, 2010), 75 FR 51310 (Aug. 19, 2010), as amended, Exchange Act Release No. 62718A (Aug. 20, 2010), 75 FR 52562 (Aug. 26, 2010) (discussing what it means to make a "recommendation").

[501] *See* Proposing Release, 76 FR at 42415, *supra* note 3.

[502] *See* Proposing Release, 76 FR at 42415, *supra* note 3.

[503] *See* Supplementary Material .03 to FINRA Rule 2090.

[504] Additionally, as discussed in Section I.E, *supra,* the duties imposed on an SBS Dealer under the business conduct rules are specific to this context, and are in addition to any duties that may be imposed under other applicable law. Thus, an SBS Dealer must separately determine whether it is subject to regulation as a broker-dealer, an investment adviser, a municipal advisor or other regulated entity.

[505] *See* Levin, *supra* note 5.

[506] *See* CFA, *supra* note 5. In response to the commenter's other concern regarding the Commission requiring SBS Dealers to maintain sufficient documentation to effectively enforce compliance with the suitability rule, we note that the Commission has separately proposed recordkeeping requirements for SBS Dealers. *See* Recordkeeping Release, 79 FR at 25135, *supra* note 242.

The Commission declines to apply Rule 15Fh–3(f) to Major SBS Participants, as suggested by one commenter.[507] As discussed above in Section II.C, where a business conduct requirement is not expressly addressed by the Dodd-Frank Act, the Commission is generally not applying such a rule to Major SBS Participants. The Commission continues to believe that it is appropriate not to impose suitability obligations on Major SBS Participants, given that, by definition, Major SBS Participants are not engaged in security-based swap dealing activity at levels above the *de minimis* threshold.[508] However, if a Major SBS Participant is, in fact, recommending security-based swaps or trading strategies involving security-based swaps to a counterparty, this would indicate that the Major SBS Participant is actually engaged in security-based swap dealing activity.[509] If a Major SBS Participant engages in such activity above the *de minimis* threshold in Exchange Act Rule 3a71–2, it would need to register as an SBS Dealer and, as such, would need to comply with the suitability obligations imposed by Rule 15Fh–3(f).

Further, Rule 15Fh–3(f) will not impose suitability obligations on an SBS Dealer transacting with an SBS Entity or Swap Entity. The Commission continues to believe that these types of counterparties, which are professional intermediaries or major participants in the swaps or security-based swaps markets, would not need the protections that would be afforded by this rule. However, taking into account the concerns of one commenter,[510] the Commission is not adopting any additional exclusions to the rule at this time, nor is the Commission applying the suitability obligations at the least granular level (*e.g.*, on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions between the parties), as suggested by another commenter.[511] The Commission is also not, as suggested by one commenter,[512] providing an opt out from the rule or a policies and procedures alternative. As discussed above in Sections II.A.3.d and II.E, the Commission believes that it is appropriate to apply the suitability rule so that counterparties receive the benefits of the protections provided by the rule; permitting parties to "opt out" of the benefits of the rule or providing a policies and procedures alternative would undermine its core purpose of protecting counterparties. However, while we are not adopting an opt out provision or a policies and procedures alternative, the Commission has determined to permit means of compliance with Rule 15Fh–3(f) that should promote efficiency and reduce costs (*e.g.*, reliance on representations pursuant to Rule 15Fh–1(b)) and allowing SBS Dealers to take into account the sophistication of the counterparty by way of the institutional suitability alternative in Rule 15Fh–3(f)(2) (described below).

The Commission is not adopting one commenter's suggestion to impose additional standards for the types of financial products that can be sold to state and local governments, including security-based swaps.[513] We have determined that additional standards are not needed and that the rules we are adopting appropriately regulate the business conduct of the professional market intermediaries selling these products. We also note that the MSRB is developing a regulatory framework for municipal advisors, including detailed standards of conduct that municipal advisors owe to municipal entities.[514]

ii. Institutional Suitability Alternative and Special Entity Suitability Alternative

After considering the comments, the Commission is adopting Rules 15Fh–3(f)(2)–(4) with a number of modifications. First, in response to a specific suggestion from a commenter,[515] the Commission is correcting a typographical error in proposed Rule 15Fh–3(f)(2). The institutional suitability alternative in proposed Rule 15Fh–3(f)(2) was intended to provide SBS Dealers with an alternative method to fulfill their customer-specific suitability obligations described in proposed Rule 15Fh–3(f)(1)(ii), not their suitability obligations described in proposed Rule 15Fh–3(f)(1)(i). Accordingly, the cross-reference in the proposed rule should have been to "paragraph (f)(1)(ii)," not to "paragraph (f)(1)." The Commission is correcting this cross-reference in the final rules.

Second, in response to concerns raised by a commenter,[516] the Commission is also limiting the availability of the institutional suitability alternative to recommendations made to "institutional counterparties." This is a change from the proposed rule under which the institutional suitability alternative would have been available with respect to recommendations made to any counterparty. Rule 15Fh–3(f)(4), as adopted, defines the term "institutional counterparty" for these purposes to mean a counterparty that is an eligible contract participant as defined in clauses (A)(i), (ii), (iii), (iv), (viii), (ix) or (x), or clause (B)(ii) (other than a person described in clause (A)(v)) of Section 1a(18) of the Commodity Exchange Act and the rules and regulations thereunder, or any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. This more closely aligns the treatment of the persons who may most need the protections of the suitability requirements with their treatment under FINRA rules, which limit the application of FINRA's analogous institutional suitability alternative to recommendations to persons (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.[517] Rule 15Fh–3(f)(2), as adopted, generally provides that an SBS Dealer may rely on the institutional suitability alternative when making recommendations to institutional counterparties. For a counterparty that is not an institutional counterparty, an SBS Dealer will need to have or obtain relevant information regarding the counterparty to establish a reasonable basis to believe that a recommended security-based swap or trading strategy involving a security-based swap is suitable for the counterparty.[518]

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[507] *See* CFA, *supra* note 5.

[508] *See* Exchange Act Rule 3a61–1(a)(1) (limiting the definition of "major security-based swap participant" to persons that are not security-based swap dealers).

[509] *See* Proposing Release, 76 FR at 42416 n.140, *supra* note 3. *See also* Definitions Adopting Release, 77 FR at 30618, *supra* note 115 ("Advising a counterparty as to how to use security-based swaps to meet the counterparty's hedging goals, or structuring security-based swaps on behalf of a counterparty, also would indicate security-based swap dealing activity.").

[510] *See* CFA, *supra* note 5.

[511] *See* Barnard, *supra* note 5.

[512] *See* FIA/ISDA/SIFMA, *supra* note 5.

[513] *See* GFOA, *supra* note 5.

[514] *See, e.g.*, Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, Consisting of Proposed New Rule G–42, on Duties of Non-Solicitor Municipal Advisors, and Proposed Amendments to Rule G–8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors, Exchange Act Release No. 76753 (Dec. 23, 2015), 80 FR 81614 (Dec. 30, 2015); Order Granting Approval of a Proposed Rule Change Consisting of Proposed Amendments to Rule G–20, on Gifts, Gratuities and Non-Cash Compensation, and Rule G–8, on Books and Records to be Made by Brokers, Dealers, Municipal Securities Dealers, and Municipal Advisors, and the Deletion of Prior Interpretive Guidance, Exchange Act Release No. 76381 (Nov. 6, 2015), 80 FR 70271 (Nov. 13, 2015); *see also* Notice of Filing of a Proposed Rule Change Consisting of Proposed Amendments to Rule G–37, on Political Contributions and Prohibitions on Municipal Securities Business, Rule G–8, on Books and Records, Rule G–9, on Preservation of Records, and Forms G–37 and G–37x, Exchange Act Release No. 76763 (Dec. 23, 2015), 80 FR 81709 (Dec. 30, 2015).

[515] *See* SIFMA (August 2015), *supra* note 5.

[516] *See* CFA, *supra* note 5.

Third, in response to specific suggestions from a commenter, the Commission is making changes to harmonize the institutional and special entity suitability alternatives with the CFTC's parallel provisions.[519] Specifically, the Commission is eliminating the separate special entity suitability alternative. Accordingly, an SBS Dealer may satisfy its customer-specific suitability obligations in Rule 15Fh–3(f)(1)(ii) with respect to any institutional counterparty, including a special entity counterparty that meets the $50 million asset threshold described above, by complying with the requirements of the institutional suitability alternative in Rule 15Fh–3(f)(2). Having a single institutional suitability alternative will result in greater consistency with the CFTC's parallel rule, which will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.[520] However, the Commission is not adopting the commenter's suggestion to add a new fourth prong to Rule 15Fh–3(f)(2) that requires an SBS Dealer to comply, in addition to the requirements of the first three prongs (as outlined below), with the requirements of Rule 15Fh–4(b) if the SBS Dealer's recommendation to a special entity would cause it to be acting as an advisor to the special entity.[521] The Commission is not making this change because the rules impose independent requirements, and the Commission believes that SBS Dealers should comply with each rule to the extent applicable.

The proposed special entity suitability alternative would have provided that an SBS Dealer would be deemed to satisfy its suitability obligations with respect to a special entity counterparty if the SBS Dealer either (1) is acting as an advisor to the special entity and complies with proposed Rule 15Fh–4(b), or (2) is deemed not to be acting as an advisor to the special entity pursuant to proposed Rule 15Fh–2(a).[522] With respect to the former, the Commission believes that when an SBS Dealer is acting as an advisor to a special entity, it is appropriate for both the best interests requirements of Rule 15Fh–4(b) and the suitability requirements of Rule 15Fh–3(f) to apply. As discussed in Section II.H.3 below, there is some overlap between the requirements, so an SBS Dealer's efforts to satisfy one set of requirements may result in satisfaction of the other. With respect to the latter, the Commission continues to believe, as noted in the Proposing Release, that the standards for determining that an SBS Dealer is not acting as an advisor under Rule 15Fh–2(a) are substantially the same as the standards that an SBS Dealer must satisfy to qualify for the institutional suitability alternative under Rule 15Fh–3(f)(2) (with the exception of the new institutional counterparty limitation described above).[523] However, the Commission agrees with the commenter that having a single institutional suitability alternative more consistent with the CFTC's rule will result in efficiencies and a lower likelihood of counterparty confusion.[524] Additionally, as we note above, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. In this regard, we believe it is important that the rules impose both sets of requirements on SBS Dealers that make recommendations to special entities so that special entities receive the full range of benefits that the rules are intended to provide.

Fourth, the Commission is adding the words "with regard to the relevant security-based swap or trading strategy involving a security-based swap" to modify "recommendations of the [SBS Dealer]" in the second prong of the institutional suitability alternative to match the language used in the first prong and clarify that those are the only recommendations to which the rule refers. The Commission is adopting the other two prongs of the institutional suitability alternative as proposed. Accordingly, as adopted, Rule 15Fh–3(f)(2) provides that when an SBS Dealer makes a recommendation, it may fulfill its customer-specific suitability obligations under Rule 15Fh–3(f)(1)(ii) with respect to an institutional counterparty, if: (1) The SBS Dealer reasonably determines that the counterparty (or its agent) is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy involving a security-based swap; (2) the counterparty (or its agent) affirmatively represents in writing that it is exercising independent judgment in evaluating the recommendations of the SBS Dealer with regard to the relevant security-based swap or trading strategy involving a security-based swap; and (3) the SBS Dealer discloses that it is acting in the capacity of a counterparty, and is not undertaking to assess the suitability of the security-based swap or trading strategy for the counterparty. If an SBS Dealer cannot rely on the institutional suitability alternative provided by Rule15Fh–3(f)(2), it would need to make an independent determination that the recommended security-based swap or trading strategy involving security-based swaps is suitable for the counterparty.

The Commission believes that the SBS Dealer reasonably could determine that the counterparty (or its agent) is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy for purposes of Rule 15Fh–3(f)(2)(i) through a variety of means. However, in response to specific suggestions from a commenter[525] and to provide additional clarity, the Commission is adding a safe harbor in Rule 15Fh–3(f)(3) providing that an SBS Dealer can satisfy its requirement under the first prong of the institutional suitability alternative in Rule 15Fh–3(f)(2) to make a reasonable determination that the counterparty (or its agent) is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy if the SBS Dealer receives appropriate written representations from its counterparty. As discussed above in Section II.D, an SBS Dealer can rely on a counterparty's written representations unless the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation. Under Rule 15Fh–3(f)(3)(i),if the counterparty is not a special entity, the representations must provide that the counterparty has complied in good faith with written policies and procedures reasonably designed to ensure that the persons evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Under Rule 15Fh–3(f)(3)(ii), if the counterparty is a special entity, the representations must satisfy the terms of the safe harbor in Rule 15Fh–5(b).[526] If an SBS Dealer chooses not to take advantage of the safe harbor provided by Rule 15Fh–3(f)(3), the Commission believes that the SBS Dealer reasonably could determine that the counterparty (or its agent) is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy for purposes of Rule 15Fh–3(f)(2)(i) through a variety of means. For example, an SBS Dealer could comply with this requirement by having a counterparty indicate in a signed agreement or other document that the counterparty is capable of independently evaluating investment risks with respect to recommendations or an SBS Dealer could call its counterparty, have that discussion, and (if it chooses or circumstances require) document the conversation to evidence the counterparty's affirmative indication.

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[517] *See* FINRA Rule 2111(b) (referring to FINRA Rule 4512(c)).

[518] *See* Rule 15Fh–3(f)(1)(ii).

[519] *See* SIFMA (August 2015), *supra* note 5. *See also* CFTC Adopting Release, 77 FR at 9771–9774, *supra* note 21.

[520] *See* SIFMA (August 2015), *supra* note 5 (noting that "[a]lthough conforming to the [parallel CFTC suitability rule] would impose additional diligence and compliance requirements on the [SBS Dealer], these requirements would not result in material costs because [SBS Dealers] are already complying with the same requirements under the [parallel CFTC rule]"). However, we note that the CFTC does not limit the availability of its institutional suitability alternative to recommendations to "institutional counterparties." *See* Commodity Exchange Act Rule 23.434(b).

[521] *See* SIFMA (August 2015), *supra* note 5. As discussed in Section II.H.2 below, Rule 15Fh–4(b) generally requires an SBS Dealer that acts as an advisor to a special entity to make a reasonable determination that any recommended security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity.

[522] *See* proposed Rule 15Fh–3(f)(3).

[523] *See* Proposing Release, 76 FR at 42416 n.137, *supra* note 3.

[524] *See* SIFMA (August 2015), *supra* note 5. However, as noted above, the CFTC does not limit the availability of its alternative to recommendations to "institutional counterparties." *See* Commodity Exchange Act Rule 23.434(b). The "institutional counterparty" limitation is discussed above.

[525] *See* SIFMA (August 2015), *supra* note 5.

The Commission continues to believe that parties should be able to make the disclosures and representations required by Rules 15Fh–3(f)(2) and (3) on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or broadly in terms of all potential transactions between the parties.[527] However, where there is an indication that a counterparty is not capable of independently evaluating investment risks, or does not intend to exercise independent judgment regarding, *all* of an SBS Dealer's recommendations, the SBS Dealer necessarily will have to be more specific in its approach to complying with the institutional suitability alternative. For instance, in some cases an SBS Dealer may be unable to determine that a counterparty is capable of independently evaluating investment risks with respect to any security-based swap. In other cases, the SBS Dealer may determine that a counterparty is generally capable of evaluating investment risks with respect to some categories or types of security-based swaps, but that the counterparty may not be able to understand a particular type of security-based swap or its risk. Additionally, the requirements of Rule 15Fh–1(b) will apply when an SBS Dealer is relying on representations from a counterparty or its representative.[528]

We are not adopting one commenter's suggestions to require SBS Dealers to conduct routine audits to ensure that the institutional suitability alternative is used appropriately.[529] The Commission does not believe that routine audits are the sole means through which an SBS Dealer could supervise its associated persons' use of the institutional suitability alternative. The Commission thinks that the totality of the supervisory requirements in Rule 15Fh–3(h) (discussed below) are appropriate to promote effective supervisory systems and believes that SBS Dealers should have the flexibility to determine what means they will use to supervise their associated persons' use of the institutional suitability alternative. The Commission notes that in supervising the use of the institutional suitability alternative, SBS Dealers should generally consider whether their associated persons' reliance on representations from counterparties is reasonable. As discussed above and in Section II.D, an SBS Dealer (or its associated person) can rely on a counterparty's written representations unless the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation. In this context, information that might be relevant to this determination includes whether the counterparty has previously invested in the type of security-based swap or been involved in the type of trading strategy that the SBS Dealer is now recommending, and whether the counterparty (or its representative) appreciates what differentiates the recommended security-based swap from a less complex alternative. If the associated person knows that the recommended security-based swap or trading strategy represents a significant change from the counterparty's prior investment strategy or knows that the counterparty (or its representative) lacks an appreciation of what differentiates the recommended security-based swap from a less complex alternative, the associated person should generally consider whether it can reasonably rely on the counterparty's representation that it is capable of independently evaluating the investment risks.[530]

The Commission is also not adopting another commenter's suggestion to add a requirement to the institutional suitability alternative that an SBS Dealer have a reasonable basis to believe its counterparty has the capacity to absorb potential losses related to the recommended security-based swap or trading strategy.[531] The Commission believes that the requirement in Rule 15Fh–3(f)(2)(i) that an SBS Dealer "have a reasonable basis to believe" that the counterparty is capable of evaluating investment risks independently is appropriate to support the objectives of the institutional suitability alternative, and does not believe it is necessary to specifically require an SBS Dealer to have a reasonable basis to believe its counterparty has the capacity to absorb potential losses related to the recommended security-based swap or trading strategy.

5. Fair and Balanced Communications

Section 15F(h)(3)(C) of the Exchange Act requires the Commission to adopt rules establishing a duty for SBS Entities to communicate in a fair and balanced manner based on principles of fair dealing and good faith.[532]

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[526] As discussed in Section II.H.6.i below, Rule 15Fh–5(b) provides a safe harbor under which an SBS Entity can comply with its obligation to have a reasonable basis to believe that its special entity counterparty has a qualified independent representative that, among other things, has sufficient knowledge to evaluate the transaction and risks and undertakes to act in the best interests of the special entity. Rule 15Fh–5(b) specifies the representations that the SBS Entity must obtain from its special entity counterparty and, in some cases, from such counterparty's representative, to satisfy the safe harbor.

[527] *See* Proposing Release, 76 FR at 42416, *supra* note 3.

[528] *See* discussion in Section II.D, *supra*.

[529] *See* Levin, *supra* note 5.

[530] As discussed in Section II.D, under Rule 15Fh–1(b), an SBS Dealer can reasonably rely on written representations from a counterparty or its representative to satisfy its due diligence obligations. Because reliance must be reasonable, the question of whether reliance on representations would satisfy an SBS Dealer's obligations under our business conduct rules will depend on the facts and circumstances of the particular matter. At a minimum, an SBS Dealer seeking to rely on representations cannot ignore information that would cause a reasonable person to question the accuracy of those representations.

[531] *See* CFA, *supra* note 5.

[532] 15 U.S.C. 78o–10(h)(3)(C).

a. Proposed Rule

Proposed Rule 15Fh–3(g) would require SBS Entities to communicate with counterparties in a fair and balanced manner based upon principles of fair dealing and good faith. In particular, the rule would require: (1) Communications to provide a sound basis for evaluating the facts with regard to any particular security-based swap or trading strategy involving a security-based swap; (2) communications not to imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; and (3) any statement referring to the potential opportunities or advantages presented by a security-based swap to be balanced by an equally detailed statement of the corresponding risks.[533]

b. Comments on the Proposed Rule

Three commenters addressed the fair and balanced communications requirement.[534] Two commenters expressed support for the proposed rule,[535] and one was opposed.[536] One of the commenters supporting the proposed rule stated that there should not be any exceptions to the proposed fair and balanced communications requirement.[537] The other commenter asserted that to be fair and balanced, communications must inform investors of both the potential rewards and risks of their investments, and also the SBS Entity's involvement and interests in the investments, in specific terms.[538] Specifically, the commenter noted that all material adverse interests should be disclosed, and that the rule should clarify that it is not enough to inform a customer that the SBS Entity "may" have an adverse interest if that adverse interest already exists.[539]

The commenter in opposition to the proposed rule asserted that a fair and balanced communications requirement is unnecessary.[540] The commenter explained that the proposed rule is not relevant in the context of SBS Entities' legacy portfolios since the proposed rule would generally prohibit puffery used to induce a counterparty to enter into new transactions.[541] Additionally, the commenter noted that due to the sophisticated nature of counterparties in the security-based swaps market, the fair and balanced communications requirement is not critical, particularly where all SBS Entities' communications are already subject to the antifraud provisions of the Dodd-Frank Act and the Exchange Act.[542]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(g) as proposed. The rule applies in connection with entering into security-based swaps, and will continue to apply over the term of a security-based swap.[543]

The Commission does not believe any changes to the rule are necessary to address a commenter's concern that to be fair and balanced, communications must inform investors of both the potential rewards and risks of their investments because Rule 15Fh–3(g)(3) already provides that "[a]ny statement referring to the potential opportunities or advantages presented by a security-based swap shall be balanced by an equally detailed statement of the corresponding risks." [544] With respect to the commenter's assertion that fair and balanced communications should also include information regarding the SBS Entity's involvement and interests in the investments,[545] the Commission notes that although specific disclosure regarding conflicts of interest is not required by Rule 15Fh–3(g), it is required by Rule 15Fh–3(b)(2) (disclosure of material incentives or conflicts of interest).

The standard set forth in Rule 15Fh–3(g) is consistent with the similarly worded requirement in the FINRA rule on communications.[546] Rule 15Fh–3(g) also includes three specific standards, drawn from the FINRA rule, which should clarify the rule requirement. The standards are: (1) Communications must provide a sound basis for evaluating the facts with respect to any security-based swap or trading strategy involving a security-based swap;[547] (2) communications may not imply that past performance will recur, or make any exaggerated or unwarranted claim, opinion, or forecast;[548] and (3) any statement referring to the potential opportunities or advantages presented by a security-based swap or trading strategy involving a security-based swap shall be balanced by an equally detailed statement of the corresponding risks.[549] As noted in the Proposing Release, these standards do not represent an exclusive list of considerations that an SBS Entity must take into account in determining whether a communication with a counterparty is fair and balanced.[550] In addition to complying with Rule 15Fh–3(g), SBS Entities should also keep in mind that all their communications with counterparties will be subject to the specific antifraud provisions added to the Exchange Act under Title VII of the Dodd-Frank Act,[551] as well as general antifraud provisions under the federal securities laws.[552] The Commission declines to eliminate the fair and balanced communications requirement, as suggested by a commenter,[553] because we believe the requirement promotes investor protection by prohibiting SBS Entities from overstating the benefits or understating the risks to inappropriately influence counterparties' investment decisions.

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[533] Proposed Rule 15Fh–3(g)(1)–(3).

[534] *See* CFA, *supra* note 5; Levin, *supra* note 5; AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[535] *See* CFA, *supra* note 5; Levin, *supra* note 5.

[536] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[537] *See* CFA, *supra* note 5.

[538] *See* Levin, *supra* note 5.

[539] *Id.*

[540] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[541] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[542] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

[543] *See* Rule 15Fh–1(a). In response to concerns expressed by a commenter, the Commission notes that there are no exceptions to Rule 15Fh–3(g). *See* CFA, *supra* note 5.

[544] *See* Levin, *supra* note 5.

[545] *Id.*

[546] FINRA Rule 2210(d). *See* NASD IM–2210–1(1), Guidelines to Ensure That Communications with the Public Are Not Misleading ("Members must ensure that statements are not misleading within the context in which they are made. A statement made in one context may be misleading even though such a statement could be appropriate in another context. An essential test in this regard is the balanced treatment of risks and potential benefits.").

[547] *Cf.* FINRA Rule 2210(d)(1)(A) ("All member communications with the public shall be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service.").

[548] *Cf.* FINRA Rule 2210(d)(1)(F) ("Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast.").

[549] *Cf.* FINRA Rule 2210(d)(1)(D) ("Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.") The Commission believes that this requirement addresses concerns raised by a commenter that to be fair and balanced, communications must inform investors of both the potential rewards and risks of their investments. *See* Levin, *supra* note 5.

[550] *See* Proposing Release, 76 FR at 42418, *supra* note 3.

[551] *See* Sections 9(j) and 15F(h)(4)(A) of the Exchange Act, 15 U.S.C. 78i(j) and 15 U.S.C. 78o–10(h)(4)(A)). *See also* Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Exchange Act Release No. 63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010) (proposing Rule 9j–1 to implement the antifraud prohibitions of Section 9(j) of the Exchange Act).

[552] *See, e.g.*, 15 U.S.C. 77q and 78i, and, if the SBS Entity is registered as a broker-dealer, 15 U.S.C. 78o.

[553] *See* AFGI (September 2012), *supra* note 5; AFGI (July 2013), *supra* note 5.

6. Obligation Regarding Diligent Supervision

Section 15F(h)(1)(B) of the Exchange Act authorizes the Commission to adopt rules for the diligent supervision of the business of SBS Entities.[554]

a. Proposed Rule

Proposed Rule 15Fh–3(h)(1) would require an SBS Entity to establish, maintain and enforce a system to supervise, and to diligently supervise, its business and associated persons, with a view to preventing violations of applicable federal securities laws, rules and regulations relating to its business as an SBS Entity. Proposed Rule 15Fh–3(h)(2) would require an SBS Entity's supervisory system to be reasonably designed to achieve compliance with applicable securities laws, rules and regulations, and would establish minimum requirements for the supervisory system. Specifically, proposed Rule 15Fh–3(h)(2)(i) would require an SBS Entity to designate at least one person with authority to carry out the supervisory responsibilities of the SBS Entity for each type of business in which it engages for which registration as an SBS Entity is required. Proposed Rule 15Fh–3(h)(2)(ii) would require an SBS Entity to use reasonable efforts to determine that all supervisors are qualified and meet standards of training, experience, and competence necessary to effectively supervise the security-based swap activities of the persons associated with the SBS Entity.

Proposed Rule 15Fh–3(h)(2)(iii) would require an SBS Entity to establish, maintain and enforce written policies and procedures addressing the supervision of the types of security-based swap business in which the SBS Entity is engaged. The policies and procedures would need to be reasonably designed to achieve compliance with applicable securities laws, rules and regulations,[555] and include, at a minimum: (1) Procedures for the review by a supervisor of transactions for which registration as an SBS Entity is required;[556] (2) procedures for the review by a supervisor of incoming and outgoing written (including electronic) correspondence with counterparties or potential counterparties and internal written communications relating to the SBS Entity's business involving security-based swaps;[557] (3) procedures for a periodic review, at least annually, of the security-based swap business in which the SBS Entity engages that is reasonably designed to assist in detecting and preventing violations of, and achieving compliance with, applicable federal securities laws and regulations;[558] (4) procedures to conduct a reasonable investigation regarding the character, business repute, qualifications, and experience of any person prior to that person's association with the SBS Entity;[559] (5) procedures to consider whether to permit an associated person to establish or maintain a securities or commodities account in the name of, or for the benefit of such associated person, at another SBS Dealer, broker, dealer, investment adviser, or other financial institution, and if permitted, procedures to supervise the trading in such account, including the receipt of duplicate confirmations and statements related to such account;[560] (6) a description of the supervisory system, including the titles, qualifications and locations of supervisory persons and the specific responsibilities of each person with respect to the types of business in which the SBS Entity is engaged;[561] (7) procedures prohibiting supervisors from supervising their own activities or reporting to, or having their compensation or continued employment determined by, a person or persons they are supervising;[562] and (8) procedures preventing the standards of supervision from being reduced due to any conflicts of interest of a supervisor with respect to the associated person being supervised.[563] Additionally, proposed Rule 15Fh–3(h)(2)(iv) would require an SBS Entity to include written policies and procedures reasonably designed, taking into consideration the nature of the SBS Entity's business, to comply with the duties set forth in Section 15F(j) of the Exchange Act.[564]

Under proposed Rule 15Fh–3(h)(3), the Commission proposed two mechanisms under which an SBS Entity or associated person would not be deemed to have failed to diligently supervise any other person. The SBS Entity or associated person could demonstrate that: (1) Such person is not subject to his or her supervision, or (2) it meets the terms of a safe harbor. The safe harbor would require the SBS Entity or associated person to satisfy two conditions. The first condition would be that the SBS Entity has established and maintained written policies and procedures, and a documented system for applying those policies and procedures, that would reasonably be expected to prevent and detect, insofar as practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to security-based swaps.[565] The second condition would be that the SBS Entity or associated person has reasonably discharged the duties and obligations required by such written policies and procedures and documented system and did not have a reasonable basis to believe that such written policies and procedures and documented system were not being followed.[566]

Finally, proposed Rule 15Fh–3(h)(4) would require an SBS Entity to promptly amend its written supervisory procedures as appropriate when material changes occur in either applicable securities laws, rules or regulations, or in the SBS Entity's business or supervisory system, and to promptly communicate any material amendments to its supervisory procedures throughout the relevant parts of its organization.

b. Comments on the Proposed Rule

Five commenters addressed the proposed supervision rule.[567] One commenter supported the requirement in proposed Rule 15Fh–3(h)(2)(iv) that SBS Entities adopt written policies and procedures reasonably designed to ensure compliance with the duties set forth in Section 15F(j) of the Exchange Act.[568] The commenter noted that this approach, which does not mandate the inclusion of specific elements or prohibitions, will provide SBS Entities flexibility in establishing compliance policies appropriate for their management and organizational structure.[569]

Another commenter argued for additional diligent supervision requirements.[570] The commenter recommended requiring supervisory personnel to report to upper management or the board, as appropriate, if they have reason to believe the SBS Entity's supervisory procedures are not proving effective in preventing violations.[571] The commenter also suggested requiring SBS Entities to reevaluate their supervisory procedures when they fail to detect or deter significant violations, and determine whether revisions are needed.[572]

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[554] 15 U.S.C. 78o–10(h)(1)(B).

[555] Proposed Rule 15Fh–3(h)(2)(iii).

[556] Proposed Rule 15Fh–3(h)(2)(iii)(A).

[557] Proposed Rule 15Fh–3(h)(2)(iii)(B).

[558] Proposed Rule 15Fh–3(h)(2)(iii)(C).

[559] Proposed Rule 15Fh–3(h)(2)(iii)(D).

[560] Proposed Rule 15Fh–3(h)(2)(iii)(E).

[561] Proposed Rule 15Fh–3(h)(2)(iii)(F).

[562] Proposed Rule 15Fh–3(h)(2)(iii)(G).

[563] Proposed Rule 15Fh–3(h)(2)(iii)(H).

[564] *See* 15 U.S.C. 78o–10(j).

[565] Proposed Rule 15Fh–3(h)(3)(i).

[566] Proposed Rule 15Fh–3(h)(3)(ii).

[567] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; MFA, *supra* note 5; NABL, *supra* note 5; SIFMA (September 2015), *supra* note 5.

[568] *See* NABL, *supra* note 5.

[569] *Id.*

[570] *See* CFA, *supra* note 5.

In contrast, a third commenter requested that the Commission narrow the proposed supervision requirements.[573] The commenter suggested that the Commission clarify that when an SBS Entity is already subject to, and complies with, comparable requirements of another "qualifying regulator" (such as risk management standards imposed by a prudential regulator), the SBS Entity's supervisory policies and procedures will be deemed to be reasonably designed for purposes of the proposed rule.[574] The commenter also requested that the Commission clarify that a person committing a violation will not be viewed as being subject to the supervision of another person unless the putative supervisor knew or should have known that he or she had the authority and responsibility to exercise control over the other person that could have prevented the violation.[575]

A fourth commenter opposed the application of the proposed rule to Major SBS Participants.[576] The commenter asserted that the proposed rule imposes burdensome and costly supervisory procedures on Major SBS Participants that are not appropriate given their non-dealer role in the marketplace, and that the potential costs of compliance would be without any meaningful offsetting benefit for other market participants or the financial markets as a whole.[577]

A fifth commenter recommended harmonizing the Commission's supervision requirements with FINRA Rule 3110 to enable SBS Entities that are also broker-dealers to make use of their existing supervisory systems and to minimize confusion.[578] Specifically, the commenter suggested eliminating the proposed requirements in proposed Rule 15Fh–3(h)(1) to "enforce" a system to supervise and to diligently supervise "the business" (as opposed to the associated persons) of the SBS Entity, and changing the description of the supervisory system from "with a view to preventing violations of" to "reasonably designed to ensure compliance with" the provisions of applicable federal securities laws and the rules and regulations thereunder relating to its business as an SBS Entity.[579] The commenter also recommended eliminating the redundant description of the supervisory system in proposed Rule 15Fh–3(h)(2), and making a number of changes to the wording of the minimum requirements listed in sub-section (h)(2) to align them with FINRA Rule 3110.[580] The commenter also asked that the Commission modify the rule text to reflect that security-based swaps are not necessarily traded in an "account" but rather pursuant to a bilateral trading relationship.[581] Additionally, the commenter recommended adding a provision allowing an SBS Entity that cannot comply with the requirement in proposed Rule 15Fh–3(h)(2)(iii)(G) (preventing a supervisor from supervising his or her own activities or reporting to a person he or she is supervising) to document its determination that compliance is not possible because of the firm's size or a supervisory person's position within the firm and document how the supervisory arrangement otherwise complies with proposed Rule 15Fh–3(h)(1).[582] The commenter also requested that the Commission provide guidance regarding risk-based reviews that is consistent with FINRA supplementary material on the topic.[583] Finally, the commenter recommended wording changes to the maintenance of written supervisory procedures requirement in proposed Rule 15Fh–3(h)(4) to harmonize with FINRA Rule 3110, including eliminating the proposed requirement to update the written supervisory procedures when material changes occur to the "business," as opposed to the supervisory system.[584]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–3(h) with certain modifications. In response to commenters' concerns regarding SBS Entities that will also be registered as broker-dealers or Swap Entities being subject to overlapping requirements with respect to their supervisory systems,[585] the modifications (discussed below) are primarily intended to make the final rule more consistent with FINRA Rule 3110 and the CFTC's supervision rule for Swap Entities while continuing to provide protections intended to help ensure that SBS Entities have effective supervisory systems.[586] While, as discussed throughout this release, we are making changes to many of the business conduct rules that are intended to make the final rules more consistent with the parallel CFTC requirements, for the supervision and CCO rules, in particular, we agree with a commenter that consistency with the parallel FINRA rules is also important because many SBS Entities have already established infrastructure to comply with those rules in the context of broader supervisory and compliance programs across their security-based swap and related securities and swaps businesses.[587] This consistency will result in efficiencies for SBS Entities that have already established supervisory systems to comply with the FINRA and/or CFTC standards. Consistent wording will also allow SBS Entities to more easily analyze compliance with the Commission's rule against their existing activities to comply with FINRA Rule 3110 and the CFTC's supervision rule for Swap Entities.

First, in response to a specific suggestion made by a commenter,[588] the

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[571] *Id.*

[572] *Id.*

[573] *See* FIA/ISDA/SIFMA, *supra* note 5.

[574] *Id.*

[575] *Id.*

[576] *See* MFA, *supra* note 5.

[577] *Id.*

[578] *See* SIFMA (September 2015), *supra* note 5. Although the Commission modeled proposed Rule 15Fh–3(h) in part on NASD Rules 3010 (Supervision) and 3012 (Supervisory Control System), the Commission subsequently approved new consolidated FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System), which are largely based on and replace NASD Rules 3010 and 3012, and corresponding provisions of the NYSE Rules and Interpretations. *See* Order Approving Proposed Rule Change as Modified by Amendment No. 1, Exchange Act Release No. 71179 (Dec. 23, 2013), 78 FR 79542 (Dec. 30, 2013).

[579] *Id.*

[580] *Id.*

[581] *Id.*

[582] *Id.*

[583] *Id.*

[584] *Id.*

[585] *See* SIFMA (September 2015), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[586] As noted above, although the Commission modeled proposed Rule 15Fh–3(h) in part on NASD Rules 3010 (Supervision) and 3012 (Supervisory Control System), the Commission subsequently approved new consolidated FINRA Rules 3110 (Supervision) and 3120 (Supervisory Control System), which are largely based on and replace NASD Rules 3010 and 3012, and corresponding provisions of the NYSE Rules and Interpretations. Among other changes to the rules, the new FINRA rules contain new or modified requirements with respect to: (i) Which personnel can supervise other personnel; (ii) which personnel are permitted to perform office inspections; (iii) review of certain internal communications; and (iv) obligations to monitor for insider trading, conduct internal investigations and provide reports to FINRA regarding such investigations. The new FINRA rule also codified guidance regarding the permissible use of risk-based systems for review of transactions and correspondence. *See* Order Approving Proposed Rule Change as Modified by Amendment No. 1, Exchange Act Release No. 71179 (Dec. 23, 2013), 78 FR 79542 (Dec. 30, 2013).

[587] *See* SIFMA (September 2015), *supra* note 5.

[588] *See* SIFMA (September 2015), *supra* note 5.

Commission is making several wording changes to the description of the general requirement to establish a supervisory system in Rule 15Fh–3(h)(1). The Commission is deleting the words "and enforce" from the description and adding the modifying language "the activities of" before associated persons so that it requires an SBS Entity to "establish and maintain a system to supervise, and [to] diligently supervise, its business and the activities of its associated persons." [589] Rule 15Fh–3(h)(2)(iii) (discussed below) includes an express requirement to enforce supervisory policies and procedures, making the additional language regarding enforcing the system to supervise unnecessary. Accordingly, the Commission believes that the rule, as adopted with these wording changes, will continue to establish requirements to help ensure that SBS Entities have effective supervisory systems, consistent with the proposed rule. At the same time, the changes will make the wording of the rule more consistent with the corresponding FINRA and CFTC requirements, as requested by a commenter. This consistency will result in efficiencies for SBS Entities that have already established supervisory systems to comply with the FINRA and/or CFTC standards, as discussed above.

Second, the Commission is making further wording changes to the descriptions of the required supervisory system in Rule 15Fh–3(h)(1) and (2) in response to concerns raised by a commenter regarding the redundancy of the descriptions.[590] Proposed Rule 15Fh–3(h)(1) would require SBS Entities to "establish . . . a system to supervise . . . with a view to preventing violations of the provisions of applicable federal securities laws and the rules and regulations thereunder relating to its business [as an SBS Entity]," and proposed Rule 15Fh–3(h)(2) would specify that the required system be "reasonably designed to achieve compliance with applicable securities laws and the rules and regulations thereunder." The Commission does not believe that the two descriptions ("prevent violations" and "achieve compliance") are substantively different, nor did we intend to give the appearance of creating two different standards for what is essentially the same requirement. Accordingly, the Commission is changing and consolidating the description of the supervisory system in Rule 15Fh–3(h)(1) to state that an SBS Entity's supervisory system "shall be reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder relating to its business [as an SBS Entity]," and eliminating the redundant description in Rule 15Fh–3(h)(2).[591] Additionally, the Commission is making parallel changes to Rules 15Fh–3(h)(2)(iii) and 15Fh–3(h)(2)(iii)(C). Specifically, the Commission is changing the requirement in Rule 15Fh–3(h)(2)(iii) that the supervisory system provide for the establishment, maintenance and enforcement of certain written policies and procedures from policies and procedures that are "reasonably designed to achieve compliance with" to policies and procedures that are "reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder." The Commission is also changing the requirement in Rule 15Fh–3(h)(2)(iii)(C) that an SBS Entity's supervisory policies and procedures include procedures for a periodic review of the SBS Entity's security-based swap business by eliminating the redundant requirement that the review be reasonably designed to assist in "achieving compliance with" applicable federal securities laws and regulations and conforming the remaining language. Accordingly, as adopted, Rule 15Fh–3(h)(2)(iii)(C) requires an SBS Entity's written supervisory policies and procedures to include "[p]rocedures for a periodic review, at least annually, of the security-based swap business in which the [SBS Entity] engages that is reasonably designed to assist in detecting and preventing violations of applicable federal securities laws and the rules and regulations thereunder."

Third, in response to concerns raised by a commenter,[592] the Commission is changing the wording of the minimum requirements for a supervisory system listed in Rule 15Fh–3(h)(2) to more closely align the requirements of our rule with those of FINRA Rule 3110, and to reflect the fact that security-based swaps are not necessarily traded in an "account" but rather pursuant to a bilateral trading relationship. Specifically, the Commission is: (1) Changing the description of the requirement that supervisors be qualified in Rule 15Fh–3(h)(2)(ii) from "qualified and meet standards of training, experience, and competence necessary to effectively supervise the security-based swap activities of the persons associated with the [SBS Entity]" to "qualified, either by virtue of experience or training, to carry out their assigned responsibilities;" [593] (2) adding "and the activities of its associated persons" to the policies and procedures requirement in Rule 15Fh–3(h)(2)(iii) so that it requires "written policies and procedures addressing the supervision of the types of security-based swap business in which the [SBS Entity] is engaged and the activities of its associated persons;" [594] (3) adding "good" to the description of the requirement to have procedures for background investigations on associated persons in Rule 15Fh–3(h)(2)(iii)(D) so that it requires "procedures to conduct a reasonable investigation regarding the good character" of an associated person; [595] (4) adding "or a trading relationship" to the description of the requirement to have procedures for considering whether to allow an associated person to conduct trading for his or her own benefit at another financial institution in Rule 15Fh–3(h)(2)(iii)(E) so that it requires "procedures to consider whether to permit an associated person to establish or maintain a securities or commodities account or a trading relationship;" and (5) changing the description of the requirement to have conflicts of interest procedures in Rule 15Fh–3(h)(2)(iii)(H) from "procedures preventing the standards of supervision from being reduced due to any conflicts of interest of a supervisor with respect to the associated person being supervised" to "procedures reasonably designed to prevent the supervisory system required by paragraph (h)(1) from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the [SBS Entity], or any compensation that the associated person conducting the supervision may derive from the associated person being supervised."[596] The Commission believes that the rule, as adopted with these changes, will continue to provide protections intended to help ensure that SBS Entities have effective supervisory systems, consistent with the proposed rule. At the same time, the changes will make the wording of the rule more consistent with the parallel FINRA requirement, resulting in efficiencies for SBS Entities that have already established supervisory systems to comply with the FINRA standard, as discussed above.

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[589] *Cf.* FINRA Rule 3110(a) ("Each member shall establish and maintain a system to supervise the activities of each associated person. . ."); Commodity Exchange Act Rule 23.602(a) ("Each [Swap Entity] shall establish and maintain a system to supervise, and shall diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar status or performing a similar function) . . .").

[590] *See* SIFMA (September 2015), *supra* note 5.

[591] This formulation tracks the requirement in Exchange Act Rule 15Fb2–1(b) that a senior officer of the SBS Entity certify on Form SBSE–C that "[a]fter due inquiry, he or she has reasonably determined that the [SBS Entity] has developed and implemented written policies and procedures reasonably designed to prevent violation of federal securities laws and the rules thereunder." *Cf.* FINRA Rule 3110(a) ("Each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules."); Commodity Exchange Act Rule 23.602(a) ("Each [Swap Entity] shall establish and maintain a system to supervise . . . Such system shall be reasonably designed to achieve compliance with the requirements of the Commodity Exchange Act and [CFTC] regulations.").

[592] *See* SIFMA (September 2015), *supra* note 5.

[593] *Cf.* FINRA Rule 3110(a)(6) ("A member's supervisory system shall provide . . . for . . . [t]he use of reasonable efforts to determine that all supervisory personnel are qualified, either by virtue of experience or training, to carry out their assigned responsibilities.").

[594] *Cf.* FINRA Rule 3110(b)(1) ("Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons . . .").

[595] *Cf.* FINRA Rule 3110(e) ("Each member shall ascertain by investigation the good character . . . of an applicant before the member applies to register that applicant with FINRA . . .").

In addition to the wording changes described above, the Commission is making two other sets of changes to the minimum requirements for a supervisory system listed in Rule 15Fh–3(h)(2). First, the Commission is eliminating the specific requirement in proposed Rule 15Fh–3(h)(2)(iii)(E) that the supervision of trading in an associated person's securities or commodities account at another financial institution "includ[e] the receipt of duplicate confirmations and statements related to such accounts." This change is intended to more closely align our requirement with the analogous FINRA rule, which was amended after our proposal.[597] The amended FINRA rule replaced the requirement to receive duplicate confirmation and statements with a more flexible standard by which firms can determine the data source(s) that are the most effective means to review trading activity. Likewise, this change is also intended to provide SBS Entities reasonable flexibility to craft appropriate supervisory policies and procedures relevant to their business model and to ascertain the means to obtain the necessary data for effective supervision. The Commission notes that the rule, in permitting flexibility, does not limit the SBS Entity's discretion to request from the associated person such transaction and account information as the SBS Entity deems necessary to fulfill its supervisory obligations (including confirmations and statements related to the account or trading relationship), and SBS Entities may consider the availability of such information and whether activity in the account can be properly monitored when determining whether to provide consent to an associated person to open or maintain an account or trading relationship at another financial institution.

Second, in response to concerns raised by a commenter,[598] the Commission is modifying Rule 15Fh–3(h)(2)(iii)(G) to address circumstances where an SBS Entity is unable to comply with the supervisory requirements due to the SBS Entity's size or supervisor's position within the SBS Entity. Pursuant to final Rule 15Fh–3(h)(2)(iii)(G), an SBS Entity that cannot comply with the requirement in Rule 15Fh–3(h)(2)(iii)(G) (preventing a supervisor from supervising his or her own activities or reporting to a person he or she is supervising) will be required to document its determination that compliance is not possible because of the firm's size or a supervisory person's position within the firm, document how the supervisory arrangement otherwise complies with Rule 15Fh–3(h)(1), and include a summary of such determination in the annual compliance report prepared by the SBS Entity's CCO pursuant to Rule 15Fk–1(c). This change is designed to address concerns raised by a commenter that due to the size or structure of some SBS Entities, it may not always be possible to prohibit an associated person who performs a supervisory function at an SBS Entity from supervising his or her own activities or reporting to a person whom he or she is supervising.[599] The Commission believes adding the provision described above will make the supervisory requirements more operationally workable by providing flexibility, in particular for supervision of very senior SBS Entity personnel, while still maintaining appropriate investor protection through the requirement to document how the supervisory arrangement otherwise complies with Rule 15Fh–3(h)(1). The Commission notes that SBS Entities relying on this provision will also be subject to the other requirements of Rule 15Fh–3(h), including the requirement in Rule 15Fh–3(h)(2)(iii)(H) to have procedures reasonably designed to prevent the supervisory system from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the SBS Entity, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised.

The Commission notes that the minimum requirements for a supervisory system listed in Rule 15Fh–3(h)(2) are not an exhaustive list. SBS Entities should keep in mind their overarching obligation in Rule 15Fh–3(h)(1) to establish and maintain a supervisory system that is reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder relating to the SBS Entity's business as an SBS Entity. For instance, although Rule 15Fh–3(h)(2)(iii)(B) only requires procedures "for the review by a supervisor of incoming and outgoing written (including electronic) correspondence with counterparties or potential counterparties and internal written communications relating to the [SBS Entity's] business involving security-based swaps," if an SBS Entity records oral communications with counterparties or potential counterparties, the SBS Entity generally should consider providing for the supervisory review of such communications.[600] Similarly, if an SBS

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[596] *Cf.* FINRA Rule 3110(b)(6)(D) ("The supervisory procedures . . . shall include . . . procedures reasonably designed to prevent the supervisory system required pursuant to paragraph (a) of this Rule from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the firm, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised, including the position of such person, the revenue such person generates for the firm, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised.").

[597] *See* Order Approving Proposed Rule Change to Adopt FINRA Rule 3210 (Accounts at Other Broker-Dealers and Financial Institutions), as Modified by Partial Amendment No. 1 and Partial Amendment No. 2, in the Consolidated FINRA Rulebook, Exchange Act Release No. 77550 (Apr. 7, 2016), 81 FR 21924 (Apr. 13, 2016) ("Proposed FINRA Rule 3210(c) would require an executing member, upon written request by the employer member, to transmit duplicate copies of confirmations and statements, or the transactional data contained therein, with respect to an account subject to the rule.").

[598] *See* SIFMA (September 2015), *supra* note 5.

[599] *See* SIFMA (September 2015), *supra* note 5.

[600] Section 15F(g)(1) of the Exchange Act provides that each SBS Entity shall maintain daily trading records of the security-based swaps of the SBS Entity and all related records (including related cash or forward transactions) and recorded

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Entity chooses to provide certain disclosures required by Rule 15Fh–3(b) orally, the SBS Entity should consider how it will supervise these oral communications.

In response to a specific suggestion made by a commenter,[601] the Commission is modifying the maintenance of written supervisory procedures requirement in Rule 15Fh–3(h)(4) to harmonize with FINRA Rule 3110. Specifically, we are changing the requirement to promptly communicate material amendments to an SBS Entity's supervisory procedures from "throughout the relevant parts of its organization" to "to all associated persons to whom such amendments are relevant based on their activities and responsibilities." [602] We believe that the new formulation will be more effective at achieving its intended result by targeting the communications to the associated persons to whom such amendments are relevant. The Commission believes that under the proposed formulation, potential interpretations of the phrase "relevant parts of its organization" may have resulted in communications to a broader than necessary group. The Commission declines to adopt the commenter's suggestion to eliminate the proposed requirement in Rule 15Fh–3(h)(4)(i) for an SBS Entity to update its written supervisory procedures when material changes occur to its "business," in addition to its supervisory system.[603] Rule 15Fh–3(h)(1) requires an SBS Entity to diligently supervise its business. Implicit in that obligation is a requirement that the SBS Entity update its supervisory system as necessary to accommodate changes to its business. The Commission does not want to create confusion regarding this obligation by eliminating the explicit requirement in Rule 15Fh–3(h)(4)(i) for an SBS Entity to update its supervisory procedures when material changes occur to its business.

In addition to the modifications discussed above, the Commission is making several clarifying changes to the rule. First, the Commission is correcting a typographical error in Rule 15Fh–3(h)(2). The cross-reference in the proposed rule should have been to "paragraph (h)(1)," not to "paragraph (g)(1)." The Commission is correcting this cross-reference in the final rule.

Second, the Commission also is making two other changes to the rule to clarify that Rule 15Fh–3(h) does not require multiple sets of written supervisory policies and procedures. Specifically, the Commission is: (1) Redesignating proposed Rule 15Fh–3(h)(2)(iv) as Rule 15Fh–3(h)(2)(iii)(I); and (2) clarifying that the written policies and procedures referred to in Rule 15Fh–3(h)(3) are those required by Rule 15Fh–3(h)(2)(iii) by adding the modifying language "as required in § 240.15Fh–3(h)(2)(iii)" after "written policies and procedures" in Rule 15Fh–3(h)(3)(i), and by changing the references in Rule 15Fh–3(h)(3)(ii) from "the written policies and procedures" to "such written policies and procedures."

Rule 15Fh–3(h) establishes supervisory obligations that incorporate principles from both Exchange Act Section 15(b) and existing SRO rules. The concept of diligent supervision in these rules is consistent with business conduct standards for broker-dealers that have historically been established by SROs for their members, subject to Commission approval. As with diligent supervision by a broker-dealer, the Commission believes that it generally would be appropriate for an SBS Entity to use a risk-based review system to satisfy its supervisory obligations under Rule 15Fh–3(h) instead of conducting detailed reviews of every transaction or every communication, so long as the SBS Entity uses a risk-based review system that is reasonably designed to provide the entity with sufficient information to allow it to focus on the areas that pose the greatest risks of federal securities law violations.[604] Use of a risk-based system allows SBS Entities the flexibility to establish their supervisory systems in a manner that reflects their business models, and based on those models, focus on areas where heightened concern may be warranted.

Rule 15Fh–3(h)(2)(iii)(I), as adopted, requires an SBS Entity to adopt written policies and procedures reasonably designed, taking into consideration the nature of such SBS Entity's business, to comply with the duties set forth in Section 15F(j) of the Exchange Act. Section 15F(j) of the Exchange Act requires an SBS Entity to comply with obligations concerning: (1) Monitoring of trading to prevent violations of applicable position limits; (2) establishing sound and professional risk management systems; (3) disclosing to regulators information concerning its trading in security-based swaps; (4) establishing and enforcing internal systems and procedures to obtain any necessary information to perform any of the functions described in Section 15F of the Exchange Act, and providing the information to regulators, on request; (5) implementing conflict-of-interest systems and procedures; and (6) addressing antitrust considerations such that the SBS Entity does not adopt any process or take any action that results in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing.[605] While the requirements of Section 15F(j) are self-executing, we highlight in particular the duty of an SBS Entity under Section 15F(j)(2) to "establish robust and professional risk management systems adequate for managing the day-to-day business" of the SBS Entity. Any risk management system established by an SBS Entity should be effective to manage the risks of the SBS Entity within the risk tolerance limits to be determined for each type of risk. We have separately proposed a rule regarding the requirement for an SBS Entity for which there is not a prudential regulator to establish, document, and maintain controls to assist it in managing the risks associated with its business activities, including market, credit, leverage, liquidity, legal, and operational risks.[606]

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communications, including electronic mail, instant messages, and recordings of telephone calls, for such period as may be required by the Commission by rule or regulation. See 15 U.S.C. 78o–10(g)(1). To implement Section 15F(g)(1) of the Exchange Act, the Commission has proposed to amend the preservation requirement in paragraph (b)(4) of Exchange Act Rule 17a–4 to include "recordings of telephone calls required to be maintained pursuant to [Section 15F(g)(1) of the Exchange Act]." Under this proposed requirement, a broker-dealer SBS Entity would be required to preserve for three years telephone calls that it chooses to record to the extent the calls are required to be maintained pursuant to Section 15F(g)(1) of the Exchange Act. The Commission has also proposed a parallel requirement for stand-alone SBS Entities. *See* Recordkeeping Release, 79 FR at 25213–25214, *supra* note 242.

[601] *See* SIFMA (September 2015), *supra* note 5.

[602] *Cf.* FINRA Rule 3110(b)(7) ("Each member shall promptly amend its written supervisory procedures to reflect changes in applicable securities laws or regulations, including FINRA rules, and as changes occur in its supervisory system. Each member is responsible for promptly communicating its written supervisory procedures and amendments to all associated persons to whom such written supervisory procedures and amendments are relevant based on their activities and responsibilities.").

[603] *See* SIFMA (September 2015), *supra* note 5.

[604] This guidance is intended to respond to a request from a commenter to provide guidance regarding risk-based reviews that is consistent with Supplementary Material .05 and .06 to FINRA Rule 3110. *See* SIFMA (September 2015), *supra* note 5.

[605] 15 U.S.C. 78o–10(j).

[606] The Commission has separately proposed to require every SBS Entity for which there is not a prudential regulator ("Non-bank SBS Dealers") to comply, with certain exceptions, with the requirements of Rule 15c3–4 under the Exchange Act "as if it were an OTC derivatives dealer with respect to all of its business activities." *See* Exchange Act Rule 18a–1(g). *See also* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and

We are not adopting a commenter's[607] suggestion that when an SBS Entity is already subject to, and complies with, comparable requirements of another "qualifying regulator" (such as risk management standards imposed by a prudential regulator), the SBS Entity's supervisory policies and procedures will be deemed to be reasonably designed for purposes of Rule 15Fh–3(h). Exchange Act Section 15F(h)(1)(B) directs the Commission to adopt rules relating to the diligent supervision of SBS Entities' business. Although we have closely conformed our supervision rule to parallel SRO requirements and believe it is also consistent with parallel CFTC requirements, we do not believe it is appropriate to defer to other regulators' rules, other than as discussed below in Section III. In addition, we are not excluding Major SBS Participants from the scope of the rule, as one commenter suggested.[608] We note that Exchange Act Section 15Fh(1)(B) explicitly contemplates that Major SBS Participants, as well as SBS Dealers, will have obligations to supervise diligently their security-based swap business. As discussed above in Section II.C, where the Dodd-Frank Act imposes a business conduct requirement on both SBS Dealers and Major SBS Participants, the rules will apply to both entities.

Rule 15Fh–3(h)(3), as adopted, provides that SBS Entities and associated persons will not be liable for failure to supervise another person if either the other person is not subject to the SBS Entity's or associated person's supervision, or if the safe harbor described in the rule is satisfied.[609] The safe harbor contains two conditions. First, the SBS Entity must have established policies and procedures, and a system for applying those policies and procedures, which would reasonably be expected to prevent and detect, to the extent practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to security-based swaps. Second, the SBS Entity or associated person must have reasonably discharged the duties and obligations incumbent on it by reason of such procedures and system without a reasonable basis to believe that such procedures were not being followed.[610] Both conditions must be met in order for an SBS Entity to satisfy the safe harbor. However, as noted in the Proposing Release, the inability to rely on the safe harbor would not necessarily mean that an SBS Entity or associated person failed to diligently supervise any other person.[611]

H. Rules Applicable to Dealings With Special Entities

Sections 15F(h)(4) and (5) of the Exchange Act provide certain additional protections for "special entities"—such as municipalities, federal and state agencies, pension plans, and endowments[612]—in connection with security-based swaps.[613]

Special entities, like other market participants, may use swaps and security-based swaps for a variety of purposes, including risk management and portfolio adjustment. In adopting the special entity provisions of the Exchange Act, the Commission seeks to implement the statute, while not impeding special entities' access to security-based swaps.

1. Scope of Definition of "Special Entity"

a. Proposed Rule

Exchange Act Section 15F(h)(2)(C) defines a "special entity" as: (i) A Federal agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of ERISA; (iv) any governmental plan, as defined in Section 3 of ERISA; or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.[614] Proposed Rule 15Fh–2(e) defines a "special entity" as: (i) A Federal agency; (ii) a State, State agency, city, county, municipality, or other political

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Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70250–70251 (Nov. 23, 2012), explaining that application of Rule 15c3–4 would require a Nonbank SBS Entity to "establish, document, and maintain a system of internal risk management controls to assist in managing the risks associated with its business activities, including market, credit, leverage, liquidity, legal, and operational risks." Rule 15c3–4 identifies a number of elements that must be part of the risk management system including, among other things: A risk control unit that reports directly to senior management and is independent from business trading units; separation of duties between persons responsible for entering into a transaction and those responsible for recording the transaction on the dealer's books; and periodic reviews (which may be performed by internal audit staff) and annual reviews (which must be conducted by independent certified public accountants) of the dealer's risk management systems. *Id.*

[607] *See* FIA/ISDA/SIFMA, *supra* note 5.

[608] *See* MFA, *supra* note 5.

[609] One commenter requested clarification that a person committing a violation will not be viewed as subject to the supervision of another person unless such other person knew or should have known that he or she had authority and responsibility to exercise control over the violator that could have prevented the violation. *See* FIA/ISDA/SIFMA, *supra* note 5. The Commission notes that if the conditions of the safe harbor in Rule 15Fh–3(h)(3) are not met, liability for failure to supervise would be a facts and circumstances determination, which would take into account the factors described by the commenter.

[610] We are not adopting a commenter's recommendation that our rules expressly require supervisory personnel to "report up" to upper management of the board, and require an SBS Entity to reevaluate its supervisory procedures if they fail to detect or deter significant violations. *See* CFA, *supra* note 5. We note that Rule 15Fh–3(h) provides a baseline for an effective supervisory system, but, as noted in the Proposing Release, a particular system may need additional elements to be effective. *See* Proposing Release, 76 FR at 42419, *supra* note 3. For that reason, Rule 15Fh–3(h)(2) states that it establishes only minimum requirements. *Id.*

[611] *See* Proposing Release, 76 FR at 42420, *supra* note 3. With respect to broker-dealers, the Commission's policy regarding failure to supervise is well established. *See* 15 U.S.C. 78o(b)(4)(E) and 15 U.S.C. 78o(b)(6)(A). As the Commission has explained in other contexts:

> The Commission has long emphasized that the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme . . . In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention. The supervisory obligations imposed by the federal securities laws require a vigorous response even to indications of wrongdoing. Many of the Commission's cases involving a failure to supervise arise from situations where supervisors were aware only of "red flags" or "suggestions" of irregularity, rather than situations where, as here, supervisors were explicitly informed of an illegal act. Even where the knowledge of supervisors is limited to "red flags" or "suggestions" of irregularity, they cannot discharge their supervisory obligations simply by relying on the unverified representations of employees. Instead, as the Commission has repeatedly emphasized, "[t]here must be adequate follow-up and review when a firm's own procedures detect irregularities or unusual trading activity. . . ." Moreover, if more than one supervisor is involved in considering the actions to be taken in response to possible misconduct, there must be a clear definition of the efforts to be taken and a clear assignment of those responsibilities to specific individuals within the firm.

John H. Gutfreund, Exchange Act Release No. 31554 (Dec. 3, 1992) (report pursuant to Section 21(a) of the Exchange Act) (footnotes omitted). *See* Proposing Release, 76 FR at 42419 n.158, *supra* note 3.

[612] *See* Section II.D.2.a, *infra.*

[613] 15 U.S.C. 78o–10(h)(4)–(5).

[614] Section 501(c)(3) of the Internal Revenue Code of 1986 includes, in its list of "exempt organizations":

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. 501(c)(3).

subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of ERISA; (iv) any governmental plan, as defined in Section 3(32) of ERISA; or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.

The Proposing Release noted that commenters had raised questions about the scope of the "special entity" definition. The Commission requested comment regarding: (1) Whether to interpret the phrase "employee benefit plan, as defined in Section 3" of ERISA to mean a plan that is subject to regulation under ERISA; (2) whether the phrase "governmental plan" should include government investment pools or other plans, programs or pools of assets; (3) the definition of the term "endowment;" (4) the treatment of collective investment vehicles in which one or more special entities are invested; (5) the treatment of foreign entities; and (6) the treatment of master trusts holding the assets of one or more funded plans of a single employer and its affiliates.

b. Comments on the Proposed Rule

One commenter argued that the term "special entity" was adequately defined in the Exchange Act, and that it "should not require extensive clarification." [615] However, most commenters requested that the Commission exclude or include specific groups from the "special entity" designation. These comments are addressed below.

i. Federal Agency

We received no comments regarding the inclusion of federal agencies within the special entity definition. In the Proposing Release, we noted that the definition of "security-based swap" excludes an "agreement, contract or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States." [616]

ii. State and Municipal Entities

One commenter suggested that we modify the description of state and municipal entities to include "any instrumentality, department, or a corporation of or established by a State or political subdivision of a State." [617] According to the commenter, this modification would harmonize the SEC's definition of "special entity" with that of the CFTC.[618]

iii. Employee Benefit Plans and Governmental Plans

As stated above, Exchange Act Section 15F(h)(2)(C)(iii) defines "special entity" to include "any employee benefit plan, as defined in Section 3 of [ERISA]." [619] Section 15F(h)(2)(C)(iv) separately adds "any governmental plan, as defined in Section 3 [ERISA]" to the special entity definition. Section 3 of ERISA defines the term "employee benefit plan" to include plans, such as most private sector employee benefit plans, that are subject to regulation under Title I of ERISA.[620] However, Section 3 of ERISA also defines the following additional categories of employee benefit plans that are not subject to" ERISA regulation: (1) Governmental plans; (2) church plans; (3) plans maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; (4) plans maintained outside the U.S. primarily for the benefit of persons substantially all of whom are nonresident aliens; or (5) unfunded excess benefit plans. [621] These latter categories of employee benefit plans, including governmental plans, are therefore "defined in" ERISA, but not "subject to" regulation under ERISA.

Commenters asked the Commission at the proposing stage to limit the scope of Section 15F(h)(2)(C)(iii) to employee benefit plans that are subject to regulation under ERISA, and not to extend the definition of "special entity" to plans that are merely "defined in" ERISA, "unless they are covered by another applicable prong of the "special entity" definition (*e.g.*, governmental plans)." [622] As the commenters noted, Exchange Act Section 15F(h)(2)(C)(iv) separately defines "special entity" to include any governmental plan, as defined in Section 3 of ERISA. Mindful of the redundancy that would result if the statute were interpreted to include governmental plans twice in the definition of "special entity," the Commission therefore requested comment regarding whether to interpret the phrase "employee benefit plan, as defined in Section 3 of [ERISA]" in Exchange Act Section 15F(h)(2)(C)(iii), or to mean a plan that is "subject to" regulation under ERISA.[623]

Seven comment letters addressed this issue. One commenter argued that the expansive language of the statute suggested that any employee benefit plan "defined in" ERISA, including a church plan, should be treated as a special entity, and that, as a matter of policy, church plans should not be treated differently than ERISA or governmental plans when entering into security-based swaps with SBS Entities.[624] This commenter recommended that the Commission revise the proposed special entity definition to clarify that church plans are special entities, or that the Commission permit church plans to "opt in" to special entity status, since opting in would provide potential counterparties greater certainty regarding whether a church plan was, in fact, a special entity.[625] Another commenter recommended that the Commission cover plans "defined in" ERISA.[626]

A collective group of three commenters argued that the definition of special entity should include only employee benefit plans that are "subject to" ERISA.[627] This group asserted that, "[s]ince Congress included a separate 'governmental plans' prong in the definition of special entity, the 'employee benefit plan' prong necessarily excludes governmental plans (both domestic and foreign) and should be read narrowly to include only employee benefit plans "subject to" ERISA." [628] However, one of these commenters later independently submitted a comment after the CFTC adopted business conduct rules, and expressed its support for an "opt in" approach.[629] This commenter asserted that the special entity definition should be limited to employee benefit plans that are "subject to" ERISA, although other employee benefit plans defined in ERISA, such as church plans, should be allowed to opt in to special entity status. According to this commenter, these modifications would harmonize the SEC and CFTC special entity definitions.

One commenter suggested treating plans subject to ERISA and government plans subject to ERISA similarly, so long as both are acting as end-users and are otherwise complying with their fiduciary obligations.[630] Another commenter suggested including governmental plans as special entities, arguing that "the taxpayers and government workers who stand behind government pensions are precisely the sort of constituents Congress sought to protect through the heightened protections of special entities." [631]

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[615] *See* CFA, *supra* note 5. *See also* Exchange Act Section 15F(h)(2)(C).

[616] Proposing Release, 76 FR 42421, n. 176, *supra* note 3 (citing Section 3(a)(68) of the Exchange Act).

[617] *See* SIFMA (August 2015), *supra* note 5.

[618] *Id.*

[619] 15 U.S.C. 78o–10(h)(2)(C)(iii).

[620] *See generally* 29 U.S.C. 1002(1)–(2).

[621] *See* 29 U.S.C. 1003(b).

[622] SIFMA/ISDA 2010 Letter at 2, *supra* note 34.

[623] Proposing Release, 76 FR at 42422 n.182, *supra* note 3.

[624] *See* Church Alliance (August 2011), *supra* note 5. *See also* Church Alliance (October 2011), *supra* note 5.

[625] *Id.*

[626] *See* CalPERS (August 2011), *supra* note 5.

[627] *See* FIA/ISDA/SIFMA, *supra* note 5.

[628] *Id.*

[629] *See* SIFMA (August 2015), *supra* note 5.

More broadly, one commenter recommended that the business conduct standards should only apply to certain governmental special entities, and that they should not apply to ERISA plans—since these plans already have similar or greater protections under ERISA.[632] The commenter argued that, by applying these standards to all special entities, the SEC "has extended its regulatory reach significantly beyond the scope of the statute," resulting in "redundant" or "overlapping" regulations.[633] The commenter recommended that the proposed rules be modified to exclude ERISA plans with security-based swap advisors that are "already sufficiently regulated." [634]

iv. Master Trusts

The Commission additionally requested comment regarding whether to include a master trust that holds the assets of one or more funded plans of a single employer and its affiliates within the special entity definition. Three commenters supported the treatment of master trusts as special entities.[635]

One comment letter suggested that the term "special entity" should be modified to include master trusts holding the assets of one or more funded plans of a single employer.[636] Another comment letter urged the Commission to clarify that master trusts would be treated as special entities, noting that, by making this clarification, the SEC would harmonize the interpretation of its rules with that of the CFTC.[637]

One commenter urged the Commission to include church benefit boards that hold the assets of multiple church plans, church endowments, and other church-related funds on a commingled basis within the special entity definition, arguing that the functions of church benefit boards are similar to those of tax-exempt trusts, or master trusts established by several multiple-employer pension plans, and that such a definition would reflect the close relationship—recognized in ERISA—between church benefit boards and their constituent church plans.[638]

v. Collective Investment Vehicles

The Commission requested comment regarding whether to interpret "special entity" to include a collective investment vehicle in which one or more special entities had invested. All eight commenters that commented on this question opposed the designation of collective investment vehicles as special entities, even where such collective investment vehicles have special entity investors.[639]

Commenters generally argued that requiring SBS Entities to investigate or "look through" their collective investment vehicle counterparties to determine whether they held special entity investments would create uncertainty in the market, increase compliance costs, disrupt the gains of special entity investors, and restrict special entities' access to security-based swaps—since collective investment vehicle managers may either limit or reject investments by special entities to avoid limitations on their security-based swap trading activities.[640]

One commenter asked the Commission to clarify that it would not "look through" collective investment vehicles to align its interpretation of the special entity definition with that of the CFTC.[641]

Two commenters argued to exclude collective investment vehicles because these vehicles are almost always passive investors, and that including them within the adopted rules would serve no regulatory purpose, since Congress' intent was to protect special entities as defined within the statute.[642]

Lastly, two commenters urged the Commission to exclude hedge funds, even where a special entity invests in that hedge fund.[643]

vi. Endowments

The Commission requested comment regarding how to apply the special entity definition to endowments, and whether certain organizations that qualify as endowments should be included in that definition. The five commenters addressing this issue suggested that the Commission limit the definition of endowments in the special entity context, with various caveats.[644]

Three commenters suggested limiting the definition of "endowments" to endowments that, themselves, enter into swaps.[645] Two of these commenters urged the Commission to clarify that the term "endowments" would not include non-profit organizations whose assets might include funds designated as an endowment,[646] while another asked that the Commission exclude organizations that use endowment assets to pledge, maintain, enhance or support the organization's collateral obligations.[647] Another commenter similarly requested that the Commission interpret the definition of endowment to exclude charitable organizations that enter into security-based swaps for which their counterparties have recourse to the organizations' endowment.[648] The commenter noted that, by making this clarification, the SEC would bring its interpretation of the rules into harmony with that of the CFTC.[649]

The last commenter requested clarification that private foundations would not be included within the special entity definition.[650] The commenter argued that these foundations are, by statute, non-profit organizations that are not publicly supported, and that "no evidence" exists that Congress intended to treat private foundations as "endowments" under Dodd-Frank.[651]

Similarly, this same commenter suggested that "institutional investor organizations" (such as large non-profits and "sophisticated" endowments) with over $1 billion of net assets under management should be excluded from the special entity definition, since large "sophisticated" endowments employ professional money managers already subject to oversight and review.[652] The commenter argued that a special entity designation for these organizations could reduce the number of SBS Entities willing to trade in security-based swaps, given the increased compliance costs associated with evaluating the qualifications of an independent representative.

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[630] *See* CalSTRS, *supra* note 5.

[631] *See* CFA, *supra* note 5.

[632] *See* ABC, *supra* note 5.

[633] *Id.*

[634] *Id.*

[635] *See* FIA/ISDA/SIFMA, *supra* note 5; Church Alliance (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[636] *See* FIA/ISDA/SIFMA, *supra* note 5.

[637] *See* SIFMA (August 2015), *supra* note 5.

[638] *See* Church Alliance (August 2011), *supra* note 5.

[639] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABA Committees, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; BlackRock, *supra* note 5; MFA, *supra* note 5; NACUBO, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[640] *Id.*

[641] *See* SIFMA (August 2015), *supra* note 5.

[642] *See* ABA Committees, *supra* note 5; NACUBO, *supra* note 5.

[643] *See* FIA/ISDA/SIFMA, *supra* note 5; BlackRock, *supra* note 5.

[644] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; NACUBO, *supra* note 5; ABA Committees, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[645] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; NACUBO, *supra* note 5.

[646] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5.

[647] *See* NACUBO, *supra* note 5.

[648] *See* SIFMA (August 2015), *supra* note 5.

[649] *Id.*

[650] *See* ABA Committees, *supra* note 5.

[651] *Id.*

[652] *See* ABA Committees, *supra* note 5.

vii. Foreign Plans, Foreign Entities

The Commission requested comment on whether to exclude from the definition of "special entity" any foreign entity. Six commenters responded to this issue.[653] All six commenters asserted that foreign entities should not be deemed special entities, although one commenter recommended that the U.S. reserve the right to extend application of its business conduct standards to foreign entities if international regulatory efforts fail.[654]

Four other commenters objected to the inclusion of foreign pension and employee benefit plans within the special entity definition on the grounds that the statutory language reflected a lack of Congressional intent to provide special protection for such plans under Dodd-Frank, and that extending the SEC's authority outside the United States would create the potential for conflict with other nations' regulatory regimes.[655] These commenters requested that the Commission revise the proposed definition of "special entity" to specifically exclude foreign entities.[656]

c. Response to Comments and Final Rule

After consideration of all comments, the Commission has determined to modify the scope of the special entity definition as described below.

i. Federal Agency

As noted above, the Commission did not receive any comments on the inclusion of federal agencies within the special entity definition. The Commission continues to believe it is appropriate to include federal agencies within the special entity definition, and is therefore adopting Rule 15Fh–2(e)(1) as proposed, renumbered as Rule 15Fh–2(d)(1).

ii. State and Municipal Special Entities

After further consideration and in light of the comment received, the Commission is modifying proposed Rule 15Fh–2(e)(2), adopted as Rule 15Fh–2(d)(2), to further define state and municipal entities to include "any instrumentality, department, or a corporation of or established by a State or political subdivision of a State."[657] As the Commission explained in another context, states may delegate powers to their political subdivisions, including the power to create corporate instrumentalities.[658] Similarly, the Commission believes a department or a corporation organized as a municipal corporate instrumentality of a state's political subdivision should be considered a municipal corporate instrumentality of a state. Corporate instrumentalities, departments, or corporations created by states or their political subdivisions are therefore taxpayer-backed institutions. Consequently, the Commission believes it is important to include "any instrumentality, department, or a corporation of or established by a State or political subdivision of a State" within the special entity definition to provide heightened protections for taxpayer-backed institutions that transact in security-based swaps.

In addition, the inclusion of this language will conform the special entity definition to that of a "municipal entity" in the Exchange Act, as well as to the CFTC's definition of State and municipal special entities, thereby providing all categories of municipal entities with heightened protections,[659] as well as addressing the commenter's concern regarding the need for a consistent definition across the security-based swaps and swaps markets.[660] This consistency should result in efficiencies for entities that transact in security-based swaps, particularly where such entities have already established a compliance infrastructure that satisfies the requirements of the existing CFTC business conduct standards.

iii. Employee Benefit Plans and Governmental Plans

Upon further consideration and in light of the comments received, the Commission is modifying proposed Rule 15Fh–2(e)(3), which stated "any employee benefit plan defined in Section 3 of [ERISA]" to state in adopted Rule 15Fh–2(d)(3) "any employee benefit plan subject to Title I of [ERISA]." Under this modification, Rule 15Fh(2)(d)(3) only includes employee benefit plans that are subject to regulation under Title I of ERISA. Furthermore, proposed Rule 15Fh–2(e)(4), renumbered as Rule 15Fh–2(d)(5), is being adopted as proposed, to include "any governmental plan, as defined in section 3(32) of [ERISA]."

In reaching this determination, we believe that Exchange Act Sections 15F(h)(2)(C)(iii) (employee benefit plans defined in Section 3 of ERISA) and 15F(h)(2)(C)(iv) (governmental plans defined in Section 3 of ERISA) should be read together "to avoid rendering superfluous" any statutory language of the Exchange Act.[661] As discussed above in Section II.H.1.b.3, Exchange Act Section 15F(h)(2)(C)(iii), read literally as any employee benefit plan "defined in" Section 3 of ERISA, would render Section 15F(h)(2)(C)(iv) superfluous, since governmental plans "defined in" ERISA are specifically designated as special entities under Section 15F(h)(2)(C)(iv). The Commission therefore agrees with the commenter that Congress' separate inclusion of governmental plans within the special entity definition supports a narrower reading of Section 15F(h)(2)(C)(iii), such that the definition only includes employee benefit plans "subject to" regulation under ERISA.[662]

We recognize that this interpretation of "special entity" would exclude other types of employee benefit plans "defined in" Section 4(b) of ERISA, including church plans and workmen's compensation plans. Therefore, upon further consideration, and in response to commenters who support a broader interpretation of the term "special entity," including those commenters who assert that a church plan should be treated as a special entity, the

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[653] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5; Johnson, *supra* note 5; BlackRock, *supra* note 5; CFA, *supra* note 5; PensionsEurope, *supra* note 7.

[654] *See* Johnson, *supra* note 5. This same commenter argued that Congress limited the territorial scope of Title VII to activities within the United States, and that extraterritorial application of these laws should only apply when international activities of U.S. firms have a "direct and significant connection with or effect on U.S. commerce," or are designed to evade U.S. rules. *Id.* For further discussion, *see* Cross Border Application and Availability of Substituted Compliance, Section III.

[655] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[656] One commenter urged the Commission to only apply the business conduct standards to security-based swap transactions involving U.S. counterparties. *See* PensionsEurope, *supra* note 7, discussed in Section III below.

[657] *See* SIFMA (August 2015), *supra* note 5; and SIFMA (November 2015), *supra* note 5 (asking the Commission to clarify that an instrumentality, department, or a corporation of, or established by, a State or political subdivision of a State is a special entity). This is consistent as well with the ECP definition for governmental entities, which includes "an instrumentality, agency, or department" of a State or political subdivision of a State. *See* Section 3(a)(65) of the Exchange Act, referring to Section 1a(18)(A)(vii)(III) of the CEA.

[658] *See* Municipal Advisor Registration Release, 78 FR at 67483, *supra* note 5.

[659] *See* Exchange Act Section 15B(e)(8), 15 U.S.C. 78o–4(e)(8) (defining "municipal entity" to include "any agency, authority, or instrumentality of the States, political subdivision, or municipal corporate entity").

[660] *See* SIFMA (August 2015), *supra* note 5; and SIFMA (November 2015), *supra* note 5.

[661] *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U.S. 104, 112 (1991).

[662] *See* FIA/ISDA/SIFMA, *supra* note 5.

Commission has determined to include an additional prong to the special entity definition.[663] Specifically, Rule 15Fh–2(d)(4), as adopted, defines a special entity to include "[a]ny employee benefit plan defined in Section 3 of [ERISA] and not otherwise defined as a special entity, unless such employee benefit plan elects not to be a special entity by notifying a security-based swap dealer or major security-based swap participant of its election prior to entering into a security-based swap with the particular security-based swap dealer or major security-based swap participant." The Commission believes that the inclusion of this additional provision appropriately resolves any tension between Exchange Act Sections 15F(h)(2)(C)(iii) and (iv), while granting broad coverage under the enhanced business conduct protections for special entities provided by the Dodd Frank Act.

Under Rule 15Fh–2(d)(4), as adopted, an employee benefit plan that is "defined in" Section 3 of ERISA but not "subject to" regulation under ERISA is included within the special entity definition, although it may elect to opt out of special entity status by notifying an SBS Entity counterparty of its election to opt out prior to entering into a security-based swap. Therefore, for example, under Rule 15Fh–2(d)(4), any church plan, as defined in Section 3(33) of ERISA, would be considered a special entity unless it elected to opt out of special entity status.[664] It is also consistent with Rule 15Fh–3(a)(3), which requires an SBS Entity to verify whether a counterparty is eligible to elect not to be a special entity, and if so, to notify the counterparty of its right to make such an election.[665] Further, by requiring employee benefit plans to notify SBS Entities of their decision to opt out, the provision will provide SBS Entities greater clarity regarding their counterparty's election to be treated as a special entity, as requested by a commenter.[666]

We note that the special entity definition the Commission is adopting today differs from the CFTC's special entity definition, which instead includes an opt-in provision for plans "defined in" ERISA.[667] While we agree with the CFTC's objective of "providing protections broadly,"[668] we have determined that inclusion of an opt-out provision will afford the maximum protections to the broadest categories of special entities, while still allowing them the flexibility to elect not to be special entities when they do not wish to avail themselves of those protections. In making this determination, we acknowledge the commenter's request that we conform our special entity definition to that of the CFTC.[669] However, we believe that the practical effect of an opt-out versus an opt-in regime should be minimal since, in either case, the SBS Entity will need to advise the counterparty of its option to be treated as a special entity. The result should be greater clarity for SBS Entities regarding the regulatory status of their counterparties.

Lastly, we disagree with the commenter's assertions that the SEC "has extended its regulatory reach" beyond the statute by applying the business conduct rules to ERISA plans, and that the resulting regulations would overlap with the preexisting regulations established under ERISA.[670] As noted above, the plain language of Exchange Act Section 15F(h)(2)(C)(iii) includes ERISA plans within the special entity definition, and we continue to believe that such plans are deserving of the heightened protections of the business conduct rules specific to special entities. Moreover, wherever practical, we have adopted bifurcated rules that acknowledge the existing federal regulatory framework for ERISA plans, thereby minimizing the tension that may arise between that framework and the business conduct standards adopted today.[671]

iv. Master Trusts

The Commission agrees with commenters that master trusts should be treated as special entities, where a master trust holds the assets of more than one ERISA plan, sponsored by a single employer or by a group of employers under common control.[672] In this regard, the Commission clarifies that, if a master trust holds the assets of an ERISA plan, the SBS Entity may satisfy the business conduct requirements being adopted today by treating the master trust as a special entity, rather than applying the business conduct rules to each underlying ERISA plan in a master trust. The Commission understands that a single employer or a group of employers under common control may sponsor multiple ERISA plans that are combined into a master trust to achieve economies of scale and other efficiencies. In such cases, the Commission does not believe that any individual ERISA plan within the master trust would receive any additional protection if the SBS Dealer or Major SBS Participant had to separately comply with the final rules with respect to each ERISA plan whose assets are held in the master trust.

The Commission similarly agrees with the commenter that, where a church benefit board holds the assets of multiple church plans as defined in Section 3(33) of ERISA, the function of the church benefit board is similar to that of a master trust.[673] Because church plans are recognized in ERISA, and a church benefit board holds only the assets of constituent church plans,[674] a church benefit board that holds the assets of church plans will be deemed a special entity under final Rule 15Fh-2(d)(4), although it will have the ability to opt out of special entity protections.

Lastly, this clarification addresses the commenter's request that the Commission interpret the special entity definition in harmony with the CFTC, as the CFTC also includes master trusts as special entities where a master trust holds the assets of more than one ERISA plan, sponsored by a single employer or by a group of employers under common control.[675] Such uniformity will help establish regulatory consistency across the security-based swap and swap markets, thereby creating efficiencies for SBS entities that transact in security-based swaps and swaps.

v. Collective Investment Vehicles

The Commission requested comment on whether to interpret "special entity" to include collective investment vehicles in which one or more special entities had invested. After consideration of the comments, the Commission has determined not to interpret "special entity" in that way. The Commission agrees with commenters that uniformly urged the Commission not to treat a collective investment vehicle as a special entity, solely because the collective investment vehicle may have one or more special entity investors.[676]

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[663] *See* Church Alliance (August 2011), *supra* note 5; CalPERS (August 2011), *supra* note 5; Church Alliance (October 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[664] *See* Church Alliance (August 2011), *supra* note 5.

[665] *See* Section II.G.1.b, *supra*.

[666] *See* Church Alliance (August 2011), *supra* note 5.

[667] *See* CFTC Adopting Release, 77 FR at 9774, *supra* note 21.

[668] 77 FR at 9776.

[669] *See* SIFMA (August 2015), *supra* note 5.

[670] *See* ABC, *supra* note 5.

[671] *See, e.g.,* Section II.H.2.c.ii, *infra*.

[672] *See* FIA/ISDA/SIFMA, *supra* note 5; Church Alliance (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5. *See also* Section 403(a) of ERISA (in general, "assets of an employee benefit plan shall be held in trust by one or more trustees") (29 U.S.C. 1103(a)); DOL Regulation 29 CFR 2520.103–1(e) (requiring the plan administrator of a Plan which participates in a master trust to file an annual report on IRS Form 5500 in accordance with the instructions for the form relating to master trusts); *see also* IRS Form 5500 Instructions, at 9 ("For reporting purposes, a 'master trust' is a trust . . . in which the assets of more than one plan sponsored by a single employer or by a group of employers under common control are held.").

[673] *See* Church Alliance (August 2011), *supra* note 5.

[674] *See generally* 29 U.S.C. 1003(b).

[675] *See* SIFMA (August 2015), *supra* note 5. *See* also CFTC Adopting Release, 77 FR at 9776, *supra* note 21.

Unlike master trusts, formed for the purpose of holding assets of ERISA plans, a collective investment vehicle may be formed for a variety of reasons and only incidentally accept investments from special entities. We share the concerns of commenters that requiring SBS Entities to investigate or "look through" their collective investment vehicle counterparties to determine whether they held special entity investments could create uncertainty in the market, and could potentially increase compliance costs, disrupt the gains of special entity investors, and restrict special entities' access to security-based swaps—since collective investment vehicle managers may either limit or reject investments by special entities to avoid application of the special entity requirements.[677]

At the same time, we recognize the potential benefits of applying heightened protections to special entities that have invested in collective investment vehicles, either by applying those protections to the collective investment vehicle itself or requiring the SBS Entity to "look through" the collective investment vehicle. After further consideration, we have determined that it would neither be appropriate to treat the entire collective investment vehicle as a special entity, nor to require an SBS Dealer to "look through" the collective investment vehicle to determine whether any of its investors qualify as special entities. While the special entity has made the decision to invest in the collective investment vehicle, it is the collective investment vehicle that enters into the security-based swap—not the special entity. In light of the foregoing, we do not believe that collective investment vehicles should be included within the special entity definition.

Lastly, our decision not to include collective investment vehicles in the special entity definition will address the commenter's suggestion that we harmonize the Commission's special entity definition with that of the CFTC to increase regulatory consistency across the security-based swap and swap markets.[678]

vi. Endowments, Non-Profit Organizations, and Private Foundations

The Commission requested comment regarding application of the special entity definition to endowments. After taking into consideration the comments, the Commission has determined to interpret the term "endowment," as used in Section 15F(h)(2)(C)(v) of the Exchange Act, not to include entities or persons other than the endowment itself. The Commission therefore agrees with commenters that special entity status should be limited to endowments that are, themselves, counterparties to security-based swaps.[679] Accordingly, the Commission does not interpret the term "endowment" to include organizations that use endowment assets to pledge, maintain, enhance or support the organization's collateral obligations, or situations where a counterparty has recourse to the organization's endowment.[680]

For clarification, and in response to comment,[681] a private foundation will be subject to special entity protections where the private foundation qualifies as an endowment under applicable state laws, rules, or regulations, including the Uniform Prudent Management of Institutional Funds Act. Although we acknowledge the commenter's assertion that private foundations typically derive their financial support through private donations,[682] we do not agree that public funding is a prerequisite to special entity status, or that private funding should necessarily exclude a foundation from qualifying for special entity status.

As noted above in Section II.G.1.b, Rule 15Fh–3(a)(2) generally requires an SBS Entity to verify whether its counterparty is a special entity before entering into the security-based swap with that counterparty. Such verification should generally include a determination whether the counterparty may be deemed an endowment under applicable state law, as described above. However, as discussed in Section II.G.1.b, *supra*, counterparties may make representations about their status as special entities at the outset of a relationship with an SBS Entity, and can "bring down" that representation for each relevant action involving a security-based swap.

Also, as with collective investment vehicles, we believe that a more expansive interpretation of the special entity definition would require a burdensome "look through" process to determine whether endowment funds had, for instance, been invested or used as collateral in a particular security-based swap, and could ultimately restrict the ability of entities that are neither themselves endowments nor special entities (such as organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 whose assets merely include funds designated as an endowment) to transact in security-based swaps.

By making the foregoing clarifications, the Commission more closely aligns its interpretation of the term "endowment" with that of the CFTC.[683] This consistency in the definition will address the commenter's concern regarding the need to promote regulatory clarity, and result in operational efficiencies for entities that have been operating under the CFTC's business conduct regime since 2012.[684]

Lastly, as discussed in more detail above in Section II.A.2.d., we decline the commenter's suggestion to permit endowments to opt out of special entity status.[685] As stated in the Proposing Release, Congress created heightened protections to mitigate the potential for abuse in SBS transactions with special entities, as the financial sophistication of special entities varies greatly.[686] As discussed above in Section II.A, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections and do not think it is appropriate to permit parties to "opt out" of those provisions. Furthermore, we note that the CFTC's adopted rules do not contain such an opt-out provision, and that Swap Entities and their special entity counterparties have been operating under this regime since 2012. For all of the foregoing reasons, and to achieve regulatory consistency across the security-based swap and swap markets, we decline to adopt an opt-out provision for endowments in the final rules.

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[676] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABA Committees, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; BlackRock, *supra* note 5; MFA, *supra* note 5; NACUBO, *supra* note 5; SIFMA (August 2015), *supra* note 5. *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABA Committees, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; BlackRock, *supra* note 5; MFA, *supra* note 5; NACUBO, *supra* note 5; SIFMA (August 2015), *supra* note 5. For clarification, and in response to commenters, the term "collective investment vehicle" in our discussion includes, but is not limited to, hedge funds that hold the assets of special entity investors. *See* FIA/ISDA/SIFMA, *supra* note 5; BlackRock, *supra* note 5.

[677] *Id.*

[678] *See* SIFMA (August 2015), *supra* note 5.

[679] *See* FIA/ISDA/SIFMA, *supra* note 5; NABL, *supra* note 5; NACUBO, *supra* note 5.

[680] *See* NACUBO, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[681] *See* ABA Committees, *supra* note 5.

[682] *Id.*

[683] *See* CFTC Adopting Release, 77 FR at 9776, *supra* note 21 ("The Commission agrees with commenters that the Special Entity prong with respect to endowments is limited to the endowment itself. Therefore, the endowment prong of the Special Entity definition under Section 4s(h)(2)(C)(v) and § 23.401(c)(5) applies with respect to an endowment that is the counterparty to a swap with respect to its investment funds. The definition would not extend to charitable organizations generally. Additionally, where a charitable organization enters into a swap as a counterparty, the Special Entity definition would not apply where the organization's endowment is contractually or otherwise legally obligations to make payments on the swap . . . .").

[684] *See* SIFMA (August 2015), *supra* note 5.

[685] *Id.*

[686] *See* Proposing Release, 76 FR at 42401, *supra* note 3.

vii. Foreign Plans and Foreign Entities

The Commission requested comment on whether to exclude from the definition of "special entity" any foreign entity. After considering the comments, all of which asserted that foreign entities should not be deemed special entities, the Commission is declining to include foreign entities within the definition of "special entity." The Commission believes that, as stated in the Cross-Border Adopting Release, the term "special entity" applies to "legal persons organized under the laws of the United States."[687] This reading addresses the concerns raised by commenters regarding the need for clarification concerning the application of the rules as they relate to special entity-specific provisions.[688]

2. "Acts as an Advisor" to a Special Entity

a. Proposed Rule

As discussed below in Section II.H.3, Section 15F(h)(4)(B) of the Exchange Act imposes a duty on an SBS Dealer acting "as an advisor" to a special entity to act in the best interests of the special entity.[689] The Dodd-Frank Act does not define the term "advisor," nor does it establish specific criteria for determining when an SBS Dealer is acting as an advisor within the meaning of Section 15F(h)(4).

The Commission proposed Rule 15Fh–2(a), which states that an SBS Dealer "acts as an advisor to a special entity when it recommends a security-based swap or a trading strategy that involves the use of a security-based swap to the special entity." We explained in the Proposing Release that, for these purposes, to "recommend" has the same meaning as that discussed in connection with Rule 15Fh–3(f).[690]

While the Dodd-Frank Act does not preclude an SBS Dealer from acting as both advisor and counterparty, the Commission recognized in the Proposing Release that it could be impracticable for an SBS Dealer acting as a counterparty to a special entity to meet the "best interests" standard imposed by Section 15F(h)(4) if it were deemed to be acting as an advisor to the special entity.[691] Proposed Rule 15Fh–2(a) would therefore provide a three-pronged safe harbor for an SBS Dealer to establish that it is not acting as an advisor. To qualify for the safe harbor, the SBS Dealer's special entity counterparty must first represent in writing that it will not rely on the SBS Dealer's recommendations, but that it will instead rely on advice from a "qualified independent representative."[692] Second, the SBS Dealer must have a "reasonable basis" to conclude that the special entity is being advised by a qualified independent representative.[693] Toward this end, the SBS Dealer could rely on the special entity's written representations unless the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation.[694] Third, the SBS Dealer must disclose that it is not undertaking to act in the special entity's best interests, as would otherwise be required under Section 15F(h)(4).[695]

b. Comments on the Proposed Rule

The Commission received numerous comments in response to the definition of "acts as an advisor" to a special entity in proposed Rule 15Fh–2(a). One commenter asserted that the meaning of the phrase "acts as an advisor to a special entity" was critical to several regulatory rulemakings, and that this term should be applied as consistently as possible.[696] That commenter and another recommended that, in developing recommendations for the final rules, the Commission staff coordinate with the Commission staff working on rules regarding municipal advisors, as well as the MSRB and the CFTC.[697] The commenter urged the Commission to work with the CFTC and the MSRB to make the definition as consistent as possible across regulatory regimes.

However, the majority of comment letters addressing proposed Rule 15Fh–2(a) related to: (1) The use of the term "recommends" when defining the phrase "acts as an advisor to a special entity;" and (2) the safe harbor from acting as an advisor to a special entity set forth in proposed Rule 15Fh–2(a)(1)–(3). These comments are summarized below.

i. "Recommends" an SBS or Related Trading Strategy to a Special Entity

Eight comment letters addressed whether an SBS Dealer should be deemed to act as an advisor if it "recommends" a security-based swap or trading strategy to a special entity.[698]

One commenter argued that the definition of "acting as an advisor" was too narrow, and should be expanded to include not only making recommendations, but also providing "more general information and opinions."[699] That commenter and another recommended that the definition of "act as an advisor" should parallel that of an "investment adviser," such that the definition would encompass advising special entities as to the value of a security-based swap or as to the advisability of a security-based swap or trading strategies involving security-based swaps.[700] The second commenter asserted that this definition would more closely conform the definition of "act as an advisor" to the definition of "investment adviser" under the Advisers Act, as well as to the definition of "commodity trading advisor" under the CEA, while preserving the benefits of the Commission's proposed safe harbor.[701]

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[687] *See* Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Final Rule; Republication, 79 FR 47278, 47306 n.234 (Aug. 12, 2014) ("Consistent with the proposal, 'special entities,' as defined in Section 15F(h)(2)(C) of the Exchange Act, are U.S. persons because they are legal persons organized under the laws of the United States").

[688] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5; BlackRock, *supra* note 5. For a more detailed discussion on the cross-border application of U.S. business conduct standards, *see* Section III, *infra*.

[689] Under proposed Rule 15Fh–4(b), an SBS Dealer that "acts as an advisor" to a special entity regarding a security-based swap must: (1) Act in the best interests of the special entity; and (2) make reasonable efforts to obtain such information that the SBS Dealer considers necessary to make a reasonable determination that a security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity. *See* Section II.H.3, *infra*.

[690] *See* Proposing Release, 76 FR at 42424, *supra* note 3.

[691] *Id.*

[692] Proposed Rule 15Fh–2(a)(1).

[693] Proposed Rule 15Fh–2(a)(2).

[694] *See also* discussion on SBS Entities acting as counterparties to special entities, Section II.H.5, *infra*.

[695] Proposed Rule 15Fh–2(a)(3).

[696] *See* NABL, *supra* note 5.

[698] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Ropes & Gray, *supra* note 5; APPA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NACUBO, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[699] *See* Better Markets (August 2011), *supra* note 5.

[700] *Id.* Under the commenter's approach, the SBS Dealer need not receive compensation for the advice to be deemed acting as an advisor. *See also* FIA/ISDA/SIFMA, *supra* note 5.

A third commenter generally supported our proposed approach, noting that "defining recommendations as advice is consistent . . . with congressional intent." [702] The commenter, however, would narrow the definition of advice to "recommendations related to a security-based swap or a security-based swap trading strategy that are made to meet the objectives or needs of a specific counterparty after taking into account the counterparty's specific circumstances." [703] Another commenter suggested that the term "recommendation" exclude communications to groups of customers or to investment managers with multiple clients, unless the communication was tailored to a member of the group or to a specific client known to the SBS Dealer.[704] According to the commenter, the Commission should clarify that a recommendation must be tailored to the circumstances of a known special-entity counterparty before giving rise to advisor status, because, without this clarification, general communications to investment advisers (that potentially have special entity clients) might result in the SBS Dealer unknowingly "acting as an advisor." [705] In 2015, after the CFTC adopted its final business conduct rules, a commenter similarly proposed that the Commission narrow the scope of the definition of "act as an advisor to a special entity" to include only recommendations that are "tailored to the particular needs or characteristics of the special entity." [706]

Another commenter argued that a definition premised on an SBS Dealer's "recommend[ing]" a security-based swap or related trading strategy was "overly broad and unwise," and that acting as an advisor "requires a more formal, acknowledged agency, as part of a relationship of trust and confidence." [707] This commenter expressed concern that a definition based on recommendations could chill communications, including informal "market chatter." [708] Two other commenters similarly urged the Commission to adopt a bright line, objective standard, where an explicit agreement by the parties would determine whether the SBS Dealer acts as advisor to the special entity.[709] Under this approach, unless the special entity and SBS Dealer agree that information provided by the SBS Dealer would form the primary basis for an investment decision, the SBS Dealer's communications would not be considered a "recommendation" under proposed Rule 15Fh–2(a).[710]

Several commenters requested that the Commission clarify whether certain communications constitute "acting as an advisor." One commenter was concerned that an SBS Dealer could provide a counterparty with data, analysis, and opinions that constituted recommendations in fact, but were not labeled or characterized as such.[711] A second commenter suggested the Commission clarify that the phrase "acting as an advisor" does not include providing general transaction, financial or market information to the special entity.[712] A third commenter recommended the final rule clarify that an SBS Dealer's "customary product explanations and marketing activities, provision of general market information, quotes in response to requests, and information pursuant to requirements in the business conduct rules would not constitute 'acting as an advisor' to a special entity." [713]

ii. Safe Harbor

The Commission received a number of comment letters on the proposed rule's safe harbor provisions. Ten comment letters generally supported the safe harbor, subject to various suggestions or objections.[714] Three commenters objected to the safe harbor.[715]

Commenters supporting the adoption of safe harbor provisions that would protect an SBS Dealer from being deemed an advisor to a special entity, argued that market participants would benefit from greater certainty provided by the safe harbor, which would enable contracting parties to specify the nature of their relationship.[716]

A number of commenters, however, expressed concern about the possible interaction of the proposed safe harbor with ERISA. One commenter, for example, generally agreed with the proposed safe harbor but expressed concern that requiring an SBS Dealer to have a "reasonable basis" to believe a special entity was being advised by a qualified independent representative could allow the SBS Dealer's opinion of an ERISA plan representative to "trump" that of the ERISA plan fiduciary.[717] For these reasons, the commenter urged the Commission to prohibit an SBS Dealer that acts as a counterparty to an ERISA plan from vetoing the plan's choice of representative.[718]

Another commenter suggested the proposed safe harbor be revised to provide that either: (1) The special entity will rely on advice from a qualified independent representative, or (2) if the special entity or its representative is relying on the Qualified Professional Asset Manager ("QPAM") or In-House Asset Manager ("INHAM") Exemption, the decision to enter into the transaction will be made by a QPAM or INHAM.[719] One commenter expressed concern with the proposed safe harbor's requirement that the special entity represent it is not

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[701] *See* FIA/ISDA/SIFMA, *supra* note 5.

[702] *See* CFA, *supra* note 5.

[703] *Id.*

[704] *See* FIA/ISDA/SIFMA, *supra* note 5.

[705] *Id.*

[706] *See* SIFMA (August 2015), *supra* note 5. As the commenter stated, these modifications would harmonize the SEC and CFTC standards for determining when a Swap Dealer or SBS Dealer is acting as an advisor to a special entity. In addition, the commenter argued that this modification would align the definition with applicable guidance under the Advisers Act.

[707] *See* Ropes & Gray, *supra* note 5.

[708] *Id.*

[709] *See* SIFMA (August 2011), *supra* note 5; APPA, *supra* note 5 (arguing that special entities would suffer the economic impact of the uncertainty resulting from a "facts and circumstances" test).

[710] *Id.*

[711] *See* Better Markets (August 2011), *supra* note 5.

[712] *See* CFA, *supra* note 5.

[713] *See* SIFMA (August 2011), *supra* note 5.

[714] *See* ABC, *supra* note 5; GFOA, *supra* note 5; NABL, *supra* note 5; NACUBO, *supra* note 5; APPA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; Ropes & Gray, *supra* note 5; Black Rock, *supra* note 5; SIFMA (August 2015), *supra* note 5; SIFMA (November 2015), *supra* note 5.

[715] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; AFSCME, *supra* note 5.

[716] *See* NABL, *supra* note 5; APPA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NACUBO, *supra* note 5.

[717] *See* ABC, *supra* note 5. The commenter expressed concern that such a veto power could render the Department of Labor's Prohibited Transaction Class Exemption 84–14 for Qualified Professional Asset Managers ("QPAMs") unavailable, and make ERISA plan representatives hesitant to vigilantly represent the plan's interests for fear of a future veto. The commenter also argued that, through this same provision, an SBS Dealer acting as an ERISA plan counterparty could learn confidential information regarding the plan or its representative.

[718] *Id.*

[719] *See* BlackRock, *supra* note 5. Section 406(a) of ERISA generally prohibits the fiduciary of a plan from causing the plan to engage in various transactions with a "party in interest" (as defined in Section 3(14) of ERISA), unless a statutory or administrative exemption applies to the transaction. Prohibited Transaction Exemption 84–14 (the "QPAM Exemption"), an administrative exemption, permits certain parties in interest to engage in transactions involving plan assets if, among other conditions, the assets are managed by a "qualified professional asset manager" (QPAM), which is independent of the parties in interest. Prohibited Transaction Exemption 96–23 (the "INHAM Exemption") provides similar conditional prohibited transaction relief for certain transactions involving plan assets that are managed by an in-house asset management affiliate of a plan sponsor.

"relying" on recommendations from the SBS Dealer.[720] As the commenter explained, since reliance is one of the essential elements of a securities fraud action, an SBS Dealer could seek to rely on the special entity's representation that it did not "rely" on the SBS Dealer's recommendation in defense of a subsequent securities fraud action against the SBS Dealer.[721] Instead, the commenter suggested "as a purely technical matter" that the safe harbor instead require a special entity to acknowledge that the SBS Dealer is not acting as advisor to the special entity.[722]

In August 2015, another commenter suggested modifying the proposed rule to harmonize with the CFTC's approach by creating a second separate safe harbor for employee benefit plans subject to Title I of ERISA that "recognizes the unique fiduciary regime already applicable to such special entities." [723] In addition to recommending a safe harbor for ERISA plans, the commenter requested two changes to the non-ERISA safe harbor: (1) Adding a requirement that an SBS Dealer may not express an opinion as to whether a special entity should enter into the recommended security-based swap or related trading strategy; and (2) eliminating the safe harbor condition that an SBS Dealer have a reasonable basis to believe that the special entity is advised by a qualified independent representative.[724] The commenter noted that the "reasonable basis" provision is absent from the parallel CFTC business conduct rule, and argued that the provision is unnecessary in light of the fact that the SBS Dealer will already receive a written representation that the special entity will rely on advice from the independent representative.[725] The commenter explained that its suggested modifications were generally intended to bring the Commission's safe harbor provisions into conformity with those of the CFTC.[726] The same commenter subsequently urged the Commission to either (i) permit SBS Entities to reasonably rely on written representations that satisfy the CFTC's safe harbor, or (ii) adopt a parallel safe harbor.[727]

Three commenters opposed the proposed safe harbor, arguing that it would erode the statutory protections for special entities. For instance, one commenter argued that the safe harbor would effectively allow SBS Dealers to give advice that might not be in the best interests of the special entity.[728] A second commenter opposed the safe harbor on the grounds that it would cause special entities to waive their right to "best interest" recommendations as a condition of transacting with SBS Dealers, and force them to rely solely on an independent representative that might be "financially beholden to the security-based swap industry." [729] The commenter also expressed concern that "in any transaction involving a customized swap, the special entity will by definition be relying on the swap dealer's assertion that the customization was designed with the particular needs of the special entity in mind," and if the SBS Dealer knows or has reason to know that the swap is not in the best interests of the special entity, the SBS Dealer "should be precluded from doing the transaction regardless of what representations the special entity provides about who it may be relying on." [730]

Similarly, a third commenter characterized the safe harbor as permitting "an SBS Dealer to escape the critical responsibilities associated with 'acting as an advisor' by having Special Entities waive this right," and expressed concern that special entities would be forced to sign "boilerplate" waivers to enter into a security-based swap.[731]

c. Response to Comments and Final Rule

As stated above, proposed Rule 15Fh–2(a) defined what it means for an SBS Dealer to act as an advisor to a special entity, and proposed Rule 15Fh–4 imposed certain requirements on SBS Dealers acting as advisors. Thus, the proposed rules would not impose these obligations on Major SBS Participants.[732] One commenter stated its view that it is appropriate to impose Rule 15Fh–4(b)'s heightened standards of conduct on professional market participants that are likely to be acting as advisors to special entities,[733] and another commenter stated that the "dealer-like obligations" of Rule 15Fh–4(b) should not be imposed on Major SBS Participants, transacting at arm's-length, as they will not likely advise special entities with respect to security-based swap transactions.[734] The Commission continues to believe that it is appropriate not to impose the heightened obligations when acting as an advisor to a special entity on Major SBS Participants, given the nature of their participation in the security-based swap markets.[735] However, if a Major SBS Participant is, in fact, recommending security-based swaps or trading strategies involving security-based swaps to a special entity, this could indicate that the Major SBS Participant is actually engaged in security-based swap dealing activity.[736] A Major SBS Participant that engages in such activity above the *de minimis* threshold in Exchange Act Rule 3a71–2 would need to register as an SBS Dealer and comply with the obligations imposed on SBS Dealers, including the obligations imposed by Rule 15Fh–4(b) when an SBS Dealer is acting as an advisor to a special entity.

Upon review and consideration of the comments, the Commission is adopting Rule 15Fh–2(a) as described below.

i. "Recommends" an SBS or Related Trading Strategy to a Special Entity

We are adopting, as proposed, Rule 15Fh–2(a), under which an SBS Dealer is defined to "act as an advisor to a special entity" when it recommends a security-based swap or a trading strategy that involves a security-based swap to a special entity.[737] For these purposes, to "recommend" has the same meaning as discussed in connection with Rule 15Fh–3(f).[738] The determination of whether an SBS Dealer has made a "recommendation" turns on the facts and circumstances of the particular situation and, therefore, whether a recommendation has taken place is not susceptible to a bright line definition.[739]

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[720] *See* Ropes & Gray, *supra* note 5.

[721] *Id.*

[722] *Id.*

[723] *See* SIFMA (August 2015), *supra* note 5.

[724] *See* SIFMA (November 2015), *supra* note 5.

[725] *Id.*

[726] *Id.*

[727] *Id.*

[728] *See* Better Markets (August 2011), *supra* note 5.

[729] *See* CFA, *supra* note 5.

[730] *Id.*

[731] *See* AFSCME, *supra* note 5.

[732] Although Section 15F(h)(2)(A) of the Exchange Act generally requires all SBS Entities to comply with the requirements of Section 15F(h)(4), the specific requirements of Sections 15F(h)(4)(B) and (C), by their terms, apply only to SBS Dealers that act as advisors to special entities.

[733] *See* CFA, *supra* note 5 (arguing that the determining factor in whether a rule should apply to a Major SBS Participant is whether it is engaged in conduct that would appropriately be regulated under the relevant standard).

[734] *See* MFA, *supra* note 5.

[735] *See* Section II.C.3 (discussing bases for applying certain requirements to SBS Dealers but not to Major SBS Participants).

[736] *See* Proposing Release, 76 FR at 42416 n.140, *supra* note 3. *See also* Definitions Adopting Release, 77 FR at 30618, *supra* note 108 ("Advising a counterparty as to how to use security-based swaps to meet the counterparty's hedging goals, or structuring security-based swaps on behalf of a counterparty, also would indicate security-based swap dealing activity.").

[737] Although we are adopting Rule 15Fh–2(a), as proposed, we are adopting the safe harbor under proposed rule 15Fh–2(a)(1)–(3) with various modifications, as discussed in Section II.H.2.c.ii, *infra*.

[738] *See* Section II.G.4, *infra*.

The Commission is not expanding the definition of "recommendation" to encompass "more general information and opinions," as suggested by a commenter.[740] Such a broad definition could have the unintended consequence of chilling commercial communications, restricting customary commercial interactions, and generally reducing market information shared with special entities regarding security-based swaps.[741] As we discussed in Section II.G.4, the Commission continues to believe that the meaning of the term "recommendation" is well-established and familiar to intermediaries in the financial services industry, including broker-dealers that rely on institutional suitability determinations, and we believe that the same meaning should be ascribed to the term in this context.

As explained in Section II.G.4, the factors considered in determining whether a recommendation has taken place include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities."[742] The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation."[743] Thus, in response to commenters' requests for clarification, an SBS Dealer typically would not be making a recommendation—and would therefore not be "acting as an advisor" to a special entity with a duty to act in the "best interests" of a special entity—solely by reason of providing general financial or market information or transaction terms in response to a request for competitive bids.[744] Furthermore, provision of information pursuant to the requirements of the business conduct rules will not, in and of itself, result in an SBS Dealer being viewed as making a "recommendation," as suggested by one commenter.[745] Rather, as stated above, the determination of whether providing information about the valuation of a security-based swap, or concerning the advisability of a security-based swap or a trading strategy, involving a security-based swap constitutes a "recommendation" turns on the particular facts and circumstances.

To avoid unnecessarily narrowing the definition of "recommendation," we decline to limit the definition of "act as an advisor" to recommendations that are designed to meet the needs of a specific counterparty after taking into account the counterparty's individual circumstances.[746] We also decline to exclude from the definition of "recommendation" communications to groups of customers or to investment managers with multiple clients.[747] We believe that such an exclusion could unnecessarily deprive groups or special entity investors of the intended protections of the rules when there are communications regarding a particular security-based swap or trading strategy to a targeted group of special entities that share common characteristics, *e.g.*, school districts. As stated above, such communications should be evaluated based on whether, in light of all the facts and circumstances, the communications could "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities."[748] We also note that the number of recipients of a given communication does not necessarily change the characteristics of the communication.

Furthermore, we are not limiting the definition of "act as an advisor" to a special entity to situations in which parties affirmatively contract or otherwise establish "more formal, acknowledged agency relationships that are part of a relationship of trust and confidence"[749] We believe this could limit the scope of the obligations and corresponding protections for special entities when an SBS Dealer "acts as an advisor" in a manner that is not consistent with the intended objectives of the rule. In short, the rule could be stripped of its intended protections if those protections only applied when the regulated entity agreed to be regulated.[750]

For the same reason, SBS Dealers may not avoid making a "recommendation" as defined in this context through disclaimer, or simply by not characterizing or labeling a recommendation as such.[751] An interpretation that would permit an SBS Dealer to disclaim its "best interests" duty, irrespective of the SBS Dealer's conduct, could essentially relieve SBS Dealers of their obligations and deprive special entities of the corresponding protections intended by Rule 15Fh–4. Rather than require the affirmative agreement of the parties to establish an advisory relationship, we are providing a safe harbor, as described in Section II.H.2.c.ii, *infra*, by which the parties can agree that an SBS Dealer is not "acting as an advisor" to a special entity where certain conditions are met—specifically, where the special entity agrees to rely on the advice of an ERISA fiduciary or other qualified, independent representative with respect to a security-based swap transaction.

We reject the commenters' suggestion that we conform the definition of an SBS Dealer that "acts as an advisor" to a special entity to the definition of "investment adviser" under the Advisers Act, or to the definition of "commodity trading advisor" under the CEA.[752] We do not agree that either definition is necessarily tailored to the specific attributes of security-based swap transactions or the unique relationships between SBS Dealers and their special entity counterparties; therefore we believe that those definitions would not necessarily provide special entities that trade in security-based swaps with the protections the business conduct rules are intended to provide.

The Commission continues to believe that the duties imposed on an SBS Dealer that "acts as an advisor" (as well as the definition of "act as an advisor" under Rule 15Fh–2(a)) are supplemental to any duties that may be imposed under other applicable law.[753] In particular, we acknowledge the commenter's suggestion that the Commission coordinate with the MSRB regarding the definition of "acts as an advisor."[754] As explained in Section

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[739] *See* Proposing Release, 76 FR at 42415, *supra* note 3. As discussed in Section II.G.4, *supra*, this is consistent with the FINRA approach as to what constitutes a recommendation.

[740] *See* Better Markets (August 2011), *supra* note 5.

[741] *See, e.g.*, Ropes & Gray, *supra*, note 5.

[742] Our approach here is consistent with that of the CFTC. *See* CFTC Adopting Release, 77 FR at 9783, n. 699, *supra* note 22.

[743] *Id.* at n. 698.

[744] *See* CFA, *supra* note 5; SIFMA (August 2011), *supra* note 5. *See also* Proposing Release, 76 FR at 42415, *supra* note 3.

[745] *See* SIFMA (August 2011), *supra* note 5.

[746] *See* CFA, *supra* note 5.

[747] *See* FIA/ISDA/SIFMA, *supra* note 5.

[748] *See* Section II.G.4, *supra*.

[749] *See* Ropes & Gray, *supra* note 5; SIFMA (August 2011), *supra* note 5; APPA, *supra* note 5.

[750] The CFTC has taken the same approach in its treatment of swap dealers. *See* CFTC Adopting Release, 77 FR at 9785, *supra* note 22.

[751] *See* Better Markets (August 2011), *supra* note 5.

[752] *See* Better Markets (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[753] *See* Proposing Release, 76 FR at 42424, *supra* note 13.

[754] *See* FIA/ISDA/SIFMA, *supra* note 5.

I.E, *supra*, we have adopted rules that provide an exemption from "municipal advisor" status for persons providing advice with respect to municipal financial products or the issuance of municipal securities where certain conditions are met, such as where the municipal entity is represented by an independent registered municipal advisor.[755] More generally, as discussed in Section I.E, *supra*, the duties imposed on an SBS Dealer under the business conduct rules are specific to this context, and are in addition to any duties that may be imposed under other applicable law. Thus, an SBS Dealer must separately determine whether it is subject to regulation as a broker-dealer, an investment adviser, a municipal advisor or other regulated entity.

Lastly, the Commission considered and agrees with the comment that the definition of "acting as an advisor" to a special entity should be applied as consistently as possible across various rulemakings, and that the Commission should coordinate with the CFTC with respect to this definition.[756] As noted in Section I.C, the staffs of the Commission and the CFTC extensively coordinated and consulted in connection with their respective rulemakings in an effort to establish a consistent rule regime across the swap and security-based swap markets. These efforts are reflected in the rules adopted today.

We note that the Commission's definition of "acts as an advisor" to a special entity under Rule 15Fh–2(a) differs slightly from the CFTC's parallel rule, under which a swap dealer is deemed to be an advisor when it "recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity." [757] While we agree that the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a "recommendation," we do not agree that a security-based swap communication must be so tailored to constitute a recommendation for purposes of Rule 15Fh–2(a). In adopting this more expansive definition of "acts as an advisor" to a special entity, the Commission believes that it will better provide the intended protections of the statute to groups of special entity investors that may be treated similarly by SBS Dealers, such as school districts.

ii. Safe Harbor

After the Commission issued the Proposing Release, the CFTC adopted final rules that provide two safe harbors from the definition of "acts as an advisor to a special entity." The first provides a safe harbor for communications between a swap dealer and an ERISA plan that has an ERISA fiduciary, and the second provides a safe harbor for communications between a swap dealer and any special entity (including a special entity that is an ERISA plan). Qualifying for either safe harbor requires specified representations in writing by the swap dealer and special entity. In response to requests from commenters, and upon further consideration, we are adopting an approach that similarly recognizes the use of ERISA fiduciaries by ERISA plans, thereby avoiding the potential conflict or confusion that may result where the existing ERISA rules intersect with the business conduct rules adopted today.[758]

In adopting a separate safe harbor for ERISA plans, we recognize that Congress has already established a comprehensive federal regulatory framework for ERISA plans. Such recognition of the existing federal regulatory framework for ERISA plans maintains statutory protections for ERISA plans, while addressing the potential conflict, recognized by commenters, between the ERISA rules and the business conduct standards we are adopting today.[759] Lastly, in adopting a bifurcated approach that provides a safe harbor specifically for ERISA plans and another that is available with respect to all special entities, we are responding to the commenter's request that we more closely align the Commission's rules with those of the CFTC to promote regulatory consistency and operational efficiency for entities that have been operating under the CFTC's business conduct regime since 2012.[760]

Under Rule 15Fh–2(a)(1), as adopted, an SBS Dealer may establish that it is not acting as an advisor to a special entity that is an ERISA plan if the special entity is represented by a qualified independent representative that meets the standard for an ERISA fiduciary. Specifically, the rule provides that an SBS Dealer will not be acting as an advisor to an ERISA special entity if: (i) The ERISA plan represents in writing that it has an ERISA fiduciary; (ii) the ERISA fiduciary represents in writing that it acknowledges that the SBS Dealer is not acting as an advisor; and (iii) the ERISA plan represents in writing that: (A) It will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the special entity receives from the SBS Dealer involving a security-based swap transaction is evaluated by an ERISA fiduciary before the transaction is entered into; or (B) any recommendation the special entity receives from the SBS Dealer involving a security-based swap transaction will be evaluated by an ERISA fiduciary before that transaction is entered into.

Allowing the ERISA plan to either make written representations about its policies and procedures or represent in writing that the security-based swap transaction will be evaluated by an ERISA fiduciary provides the ERISA plan greater flexibility in structuring its relationship with the SBS Dealer. Moreover, these requirements, taken together, are designed to ensure that the ERISA fiduciary, not the SBS Dealer, is evaluating the security-based swap transaction on behalf of the ERISA plan. As an ERISA fiduciary is already required by statute to, among other things, act with prudence and loyalty when evaluating a transaction for an ERISA plan,[761] the Commission believes it is appropriate to provide the safe harbor for when an SBS Dealer would not be deemed to be acting as an advisor to the ERISA plan for purposes of this rule.

Under Rule 15Fh–2(a)(2), as adopted, an SBS Dealer can establish it is not acting as an advisor to any special entity (including a special entity that is an ERISA plan) when the special entity is relying on advice from a qualified independent representative that satisfies specific criteria. An SBS Dealer will not be "acting as an advisor" to any special entity (including a special entity that is an ERISA plan) if: (i) The special entity represents in writing that it acknowledges that the SBS Dealer is not acting as an advisor, and that the special entity will rely on advice from a qualified independent representative; and (ii) the SBS Dealer discloses that it is not undertaking to act in the best interests of the special entity.[762]

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[755] *See* Municipal Advisor Registration Release, *supra* note 54.

[756] *See* NABL, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[757] 17 CFR 23.440(a).

[758] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[759] *Id.*

[760] *See* SIFMA (August 2015), *supra* note 5. *See also* CFTC Adopting Release, 77 FR at 9784, n. 701, supra note 22.

[761] ERISA fiduciaries are required to act with both loyalty (*see* Section 404(a)(1)(A)) and prudence (*see* Section 404(a)(1)(B)) when evaluating a transaction for an ERISA plan. In addition, ERISA fiduciaries are subject to statutory prohibitions against entering into certain categories of transactions between a plan and a "party in interest" (*see* Section 406(a)), and prohibitions against self-dealing and other conflicts of interest (*see* Section 406(b)). *See supra* note 38.

In adopting the safe harbor, the Commission agrees with commenters that the provisions in Rule 15Fh–2(a)(1)–(2) will reduce uncertainty regarding the role of an SBS Dealer when transacting with a special entity.[763] Requiring special entities (or their fiduciaries) to affirm in writing that they acknowledge the SBS Dealer is not acting as an advisor, and that they will instead obtain advice from a qualified independent representative, will help ensure that the parties are aware of their respective rights and obligations regarding a security-based swap transaction. While our rules would permit an SBS Dealer to rely on the special entity's (or its fiduciary's) written representations, the SBS Dealer's reliance must still be reasonable, as required under Rule 15Fh–1(b). Specifically, the SBS Dealer may not rely on a representation if the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation.[764] The requirement that a special entity or its fiduciary represents in writing that it acknowledges the SBS Dealer is not acting as an advisor differs from the proposed safe harbor, which would have required the special entity to represent that it would not rely on the SBS Dealer's recommendations. The Commission is making this change in response to a commenter's concern.[765] The Commission does not intend to affect the rights of parties in private actions.

The safe harbor under 15Fh–2(a)(2), as adopted, also differs from the proposed rule, which would have required that an SBS Dealer must have a reasonable basis to believe that the special entity is advised by a qualified independent representative. Rather, under adopted Rule 15Fh–2(a)(2)(i), the safe harbor requires written representations from the special entity that it will rely on advice from a qualified independent representative.[766] The Commission agrees with the commenter that requiring special entities to make representations to SBS Dealers in writing that they are relying on advice from a qualified independent representatives addresses the proposed rule's underlying policy concern—*i.e.*, that the special entity is represented by a qualified independent representative.[767] Moreover, we believe that requiring special entities to effectively confirm that they have qualified independent representatives addresses the commenter's concern that the proposed rule would allow SBS Dealers to evaluate the qualifications of a special entity's independent representative and vest SBS Dealers with the authority to "trump" the special entity's choice of representative.[768] An SBS Dealer could rely on the special entity's written representations unless the SBS Dealer has information that would cause a reasonable person to question the accuracy of the representation, including the representation that the special entity is relying on advice from a qualified independent representative.

While we acknowledge commenters' concerns that the safe harbor might erode the statutory protections for special entities,[769] we also have considered the inherent tensions that arise where SBS Dealers have concurrent, potentially conflicting roles as advisor and counterparty to special entities. On the one hand, the SBS Dealer as advisor is subject to a duty to act in the "best interests" of the special entity. On the other hand, a broad application of the "best interests" standard could have the unintended consequences of chilling commercial communications, restricting customary commercial interactions, reducing market information shared with special entities, as well as reducing the ability of special entities to engage in security-based swaps. In adopting the safe harbor, we acknowledge the tension between the SBS Dealer's potentially conflicting roles as advisor and counterparty by recognizing that the special entity may be separately advised by a fiduciary or other qualified independent representative, who will act in the special entity's best interests.

We disagree with commenters that adoption of the safe harbor could cause special entities to waive their right to "best interests" standards or sign "boilerplate agreements" as a condition of transacting with SBS Entities.[770] Rather, the safe harbor reflects an approach that is conditioned upon the involvement of an ERISA fiduciary or other qualified independent representative that is otherwise required to act in the best interests of the special entity.

Although the safe harbor the Commission is adopting today largely aligns with that of the CFTC, it differs from that of the CFTC in four respects: (1) Rules 15Fh–2(a)(1)(ii) and 15Fh–2(a)(2)(i)(A) require the special entity or its fiduciary to represent in writing that it acknowledges the SBS Dealer is not acting as an advisor, whereas the CFTC requires the special entity or its fiduciary to represent it will not rely on the SBS Dealer's recommendations;[771] (2) Rules 15Fh–2(a)(1)(iii)(A) and (B) apply to any recommendation the special entity receives from the security-based swap dealer "involving" a security-based swap transaction, while the parallel CFTC rules apply to recommendations "materially affecting" a security-based swap transaction;[772] (3) Rule 15Fh–2(a)(1)(iii) requires a security-based swap transaction to be evaluated by a fiduciary before the transaction "is entered into," whereas the CFTC's safe harbor requires a swap transaction to be evaluated by fiduciary before the transaction "occurs";[773] and (4) the safe harbor in Rule 15Fh–2(a) does not prohibit an SBS Dealer acting as an advisor from expressing an opinion as to whether a special entity should enter into a recommended security-based swap or trading strategy.[774] The Commission believes it is appropriate to differ from the CFTC in these three discrete areas for the following reasons.

First, as discussed above, the Commission believes that replacing the requirement that the special entity or its fiduciary represent it will not "rely" on the SBS Dealer's recommendations with the requirement that the special entity or its fiduciary represent in writing that it acknowledges that the SBS Dealer is not "acting as an advisor" will afford special entities the same statutory protections. As noted above, the Commission is making this change in response to a commenter's concern.[775] The Commission does not intend to affect the rights of parties in private actions.

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[762] However, as noted above in Section II.G.4.c.ii, an SBS Dealer that makes a recommendation to a special entity will still need to have a reasonable basis to believe that a recommended security-based swap or trading strategy involving a security-based swap is suitable for the special entity.

[763] *See* NABL, *supra* note 5; APPA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NACUBO, *supra* note 5.

[764] Rule 15Fh–1(b).

[765] *See* Ropes & Gray, *supra* note 5.

[766] In addition, the safe harbor as adopted continues to require that the SBS Dealer disclose to the special entity that it is not undertaking to act in the best interest of the special entity. *See* Rule 15Fh–2(a)(2)(ii).

[767] *See* SIFMA (November 2015), *supra* note 5.

[768] *See* ABC, *supra* note 5. *See also* Section II.H.5, *infra*.

[769] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; AFSCME, *supra* note 5.

[770] *See* CFA, *supra* note 5; AFSCME, *supra* note 5.

[771] *See* 17 CFR 23.440(b)(1)(ii), (b)(2)(ii)(A).

[772] See 17 CFR 23.440(b)(1)(iii)(A)–(B).

[773] *See* 17 CFR 23.440(b)(1)(iii).

[774] *Cf.* 17 CFR 23.440(b)(2)(i).

[775] *See* Ropes & Gray, *supra* note 5.

Second, the Commission has determined to replace the phrase "materially affecting" with the word "involving" in relation to the recommendations that a special entity receives from an SBS Dealer. We believe that further clarification is needed in the context of Rule 15Fh–2(a)(1) to make clear that all recommendations made by the SBS Dealer are covered by this provision.

Third, the Commission has determined to use the phrase "is entered into," as it is consistently used throughout the business conduct rules being adopted today.[776] However, because we also believe that the CFTC's usage of the word "occurs" was intended to have the same meaning as the phrase "is entered into," we expect the practical effect of CFTC Regulation 23.440(b)(1)(iii) to be substantially the same as Rule 15Fh–2(a)(1)(iii).[777]

Fourth, the Commission declines to adopt the provision in CFTC Regulation 23.440(b)(2)(i), under which Swap Dealers seeking to avail themselves of the safe harbor would be precluded from "expressing an opinion" as to whether the special entity should enter into a recommended security-based swap or trading strategy. Under the rules adopted today, the determination of whether an SBS Dealer has provided advice to a special entity turns on whether a communication is considered a "*recommendation,*" not whether the SBS Dealer has "expressed an opinion." Unlike the word "recommendation," the phrase "express an opinion" is not defined or described in the federal securities laws in this context, and therefore may have other meanings that could cause confusion. Further, we also believe the concern that underlies the CFTC's provision (*i.e.,* that the special entity obtain advice regarding a security-based swap from an ERISA fiduciary or other qualified independent representative) is sufficiently addressed by the requirement in Rules 15Fh–2(a)(1)–(2) that the special entity or its fiduciary represent that it acknowledges that the SBS Dealer is not acting as an advisor. It is therefore the Commission's view that prohibiting SBS Dealers from "expressing an opinion" would neither increase regulatory clarity regarding whether an SBS Dealer's conduct falls within the safe harbor, nor provide a corresponding increase in protection for special entities.

3. Definition of "Best Interests"

Exchange Act Section 15F(h)(4)(B) imposes on an SBS Dealer that "acts as an advisor" to a special entity a duty to act in the "best interests" of the special entity. In addition, Section 15F(h)(4)(C) requires the SBS Dealer that "acts as an advisor" to a special entity to make "reasonable efforts to obtain such information as is necessary to make a reasonable determination" that any swap recommended by the SBS Dealer is in the "best interests" of the special entity.[778] The term "best interests" is not defined in the Dodd-Frank Act, and the Commission did not propose to define "best interests." In the Proposing Release, we noted that the "best interests" duty for an SBS Dealer acting as an advisor to a special entity "goes beyond and encompasses the general suitability requirement of proposed Rule 15Fh–3(f)." We sought comment on whether we should define the term "best interests," and if so, whether such definition should use formulations based on the standards applied to investment advisers,[779] municipal advisors,[780] ERISA fiduciaries,[781] or some other formulation.

a. Proposed Rules

Proposed Rule 15Fh–4(b)(1) would generally require an SBS Dealer that acts as an advisor regarding a security-based swap to a special entity to act in the "best interests" of the special entity.

Proposed Rule 15Fh–4(b)(2) would require the SBS Dealer to make "reasonable efforts" to obtain the information necessary to make a reasonable determination that a security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity, and that such information shall include but not be limited to: (i) The authority of the special entity to enter into a security-based swap; (ii) the financial status of the special entity, as well as future funding needs; (iii) the tax status of the special entity; (iv) the investment or financing objectives of the special entity; (v) the experience of the special entity with respect to entering into security-based swaps, generally, and security-based swaps of the type and complexity being recommended; (vi) whether the special entity has the financial capability to withstand changes in market conditions during the term of the security-based swap; and (vii) such other information as is relevant to the particular facts and circumstances of the special entity, market conditions and the type of security-based swap or trading strategy involving a security-based swap being recommended.

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[776] *See, e.g.,* Rule 15Fh–1 ("Sections 240.15h–1 through 240.15Fh–6, and 240.15Fk–1 apply, as relevant in connection with *entering into* security-based swaps . . ."); Rule 15Fh–3(a)(1), (2) (". . . before *entering into* a security-based swap . . ."); Rule 15Fh–3(b) ("At a reasonably sufficient time prior to *entering into* a security-based swap . . ."); Rule 15Fh–6(b)(1) ("It shall be unlawful for a security-based swap dealer to offer to *enter into, or enter into,* a security-based swap . . .") (emphasis added).

[777] *See generally* CFTC Adopting Release, 77 FR at 9784, *supra* note 22.

[778] Section 15F(h)(5) of the Exchange Act also requires an SBS Entity that is a counterparty to a special entity to have a "reasonable basis" to believe the special entity has an independent representative that undertakes to act in the best interests of the special entity.

[779] We have stated that an adviser must deal fairly with clients and prospective clients, seek to avoid conflicts with its clients and, at a minimum, make full disclosure of any material conflict or potential conflict. *See* Amendments to Form ADV, Investment Advisers Act Release No. 3060 (Jul. 28, 2010), 75 FR 49234 (Aug. 12, 2010), *citing SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191–194 (1963) (holding that investment advisers have a fiduciary duty enforceable under Section 206 of the Advisers Act, that imposes upon investment advisers the "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation to 'employ reasonable care to avoid misleading'" their clients and prospective clients).

[780] *See, e.g.,* Exchange Act Section 15B(b)(2)(L), 15 U.S.C. 78o–4(b)(2)(L) (requiring the MSRB to prescribe means reasonably designed to prevent acts, practices, and courses of conduct that are not consistent with a municipal advisor's fiduciary duty to its municipal entity clients). In April 2015, the MSRB filed proposed Rule G–42 with the Commission for approval, which rule would establish core standards of conduct for municipal advisors when engaging in municipal advisory activities, other than municipal advisory solicitation activities. The rule was published in the **Federal Register** on May 8, 2015. *See* Exchange Act Release No. 74860 (May 4, 2015), 80 FR 26752. *See also* Exchange Act Release Nos. 75628 (Aug. 6, 2015), 75737 (Aug. 19, 2015), and 76420 (Nov. 10, 2015). The rule was approved, with amendments, on December 23, 2015. *See* Exchange Act Release No. 76753 (Dec. 23, 2015).

[781] *See, e.g.,* 29 U.S.C. 1104(a)(1)(A) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: (i) Providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan") and 29 U.S.C. 1104(a)(1)(B) (a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims").

b. Comments on the Proposed Rules

The Commission received six comment letters on the imposition of a "best interests" standard.[782] One commenter argued that the Commission should define what it means to act in the "best interests," and proposed that the definition must "be at least as strong as the concept of 'best interest' [that] has evolved under the fiduciary principles applicable to investment [advisers]." [783] The commenter additionally requested that the Commission acknowledge "that the best interest standard intended by Congress is a fiduciary concept that goes well beyond suitability." [784]

Similarly, a second commenter supporting a best interests standard stated it did not believe it was "necessary, or even appropriate," to strictly define best interests.[785] The commenter asked the Commission to provide guidance on how to apply the standard in particular circumstances. This commenter asserted that Congress did not intend to apply the ERISA fiduciary standard, and argued that the intended model for the "heightened standard" was the Advisers Act fiduciary duty.[786] The commenter stated that Congress did not seek to eliminate all conflicts of interest but to ensure that such conflicts of interest would be appropriately managed and fully disclosed.[787] The commenter urged that in providing guidance in this area, it is important for the Commission to clarify that not all suitable recommendations would satisfy a best interest standard and that the best interest standard would impose a "heightened duty beyond mere suitability" and would require SBS Dealers to "recommend from among the various suitable options the approach they believe to be best for the special entity." [788] In addition, the commenter stated that the guidance should "clarify that the best interest standard is consistent with various different methods of compensation and with proprietary trades, but that it requires the full disclosure of any conflicts of interest." In the context of an SBS Dealer acting as an advisor and serving as a counterparty, the commenter suggested that the Commission clarify that it would not be inconsistent with the SBS Dealer's duty to act in the best interests of the special entity if the SBS Dealer, as principal, earned a reasonable profit or fee from transacting with the special entity.[789]

A third commenter asserted that Congress rejected the imposition of a fiduciary duty on SBS Dealers as incompatible with their role as market makers and asked the Commission to "respect Congressional intent" to protect the ability of end users and pension plans to transact in security-based swaps in a cost-effective manner by rejecting such a duty.[790]

Two additional commenters argued that an SBS Dealer that "acts as an advisor to a special entity" and complies with the "best interest" requirements might become an ERISA fiduciary under the DOL's proposed redefinition of the term "fiduciary." [791] Accordingly, one of these commenters requested that the Commission clarify that compliance with the business conduct standards would not transform an SBS Dealer into a fiduciary under ERISA or under the final DOL regulation.[792]

One of these commenters also opposed the best interest requirement, and recommended that it be omitted from the final rules.[793] The commenter expressed its concern that "[r]equiring that an SBS Dealer act in the best interests of a counterparty who is a special entity would confuse the roles of the parties and have an adverse impact on the flow of information regarding investment and trading strategies." [794] Additionally, if the requirement is retained, the commenter recommended that the term "best interests" be defined as complying with proposed Rule 15Fh–3(g) (fair and balanced communications),[795] and NASD Rule 2010(d), which would require that communications be based on principles of fair dealing and good faith, be fair and balanced, and provide a sound basis for evaluating the transaction.[796]

After the CFTC adopted its rules in 2012, one commenter asserted that "to promote legal certainty and the ability of SBS dealers to continue to trade with special entities, the SEC should provide guidance clarifying the nature of an SBS Dealer's 'best interests' duty." [797] Specifically, the commenter asserted that, to harmonize with CFTC guidance, the Commission should clarify that the best interest duty is not a fiduciary duty, but is rather a duty for the SBS Dealer to: (1) Comply with the requirement to make a reasonable effort to obtain necessary information; (2) act in good faith and make full and fair disclosure of all material facts and conflicts of interest with respect to the recommended security-based swap or related trading strategy; and (3) employ reasonable care that any recommendation made to the special entity be designed to further the special entity's stated objectives.[798] The commenter also suggested that, consistent with the CFTC's guidance, a recommendation need not represent the best of all possible alternatives to meet the best interest standard. Additionally, the commenter stated that the determination whether a recommendation is in a special entity's best interest should be based on the information known to the SBS Dealer at the time a recommendation was made.[799] Furthermore, according to the commenter, the best interest duty should not impede an SBS Dealer from negotiating the terms of a transaction in its own interests, or from making a reasonable profit in a transaction; nor should it impose an ongoing obligation on the SBS Dealer to act in the best interest of the special entity.[800] This commenter also suggested deleting the requirement under Rule 15Fh–4(b)(i) that the SBS Dealer "make reasonable efforts to obtain information regarding 'the authority of the special entity to enter into a security based swap.' " [801] Toward this end, the commenter argued that the CFTC eliminated this requirement as it was "duplicative" of the know your customer requirement under the CFTC's business conduct rules. As the commenter stated: "Since proposed Rule 15Fh3(e)(3) would require an SBS dealer to obtain this information, we believe the same considerations support eliminating that requirement here." [802] Moreover, the commenter proposed a bifurcated treatment of ERISA and non-ERISA special entities under Rule 15Fh–5(a) to recognize the "unique fiduciary regime" already applicable to ERISA special entities, as well as to "reduce costs for special entities since most of them have already conformed their relationships with their representatives to satisfy the CFTC's qualification criteria."[803]

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[782] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Johnson, *supra* note 5; ABC, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[783] *See* Better Markets (August 2011), *supra* note 5 (noting that Congress expressly described the standard as "best interest" in Exchange Act Sections 15F(h)(2)(A) and (B), 15F(h)(4) and 15F(h)(5)).

[784] *Id.*

[785] *See* CFA, *supra* note 5.

[786] *Id.*

[787] *Id.*

[788] *Id.*

[789] *Id.*

[790] *See* Johnson, *supra* note 5.

[791] *See* ABC, *supra* note 5; BlackRock, *supra* note 5.

[792] *See* ABC, *supra* note 5.

[793] *See* BlackRock, *supra* note 5.

[794] *Id.*

[795] *See* Section II.G.5, *supra.*

[796] *Id.*

[797] *See* SIFMA (August 2015), *supra* note 5.

[798] *Id.*

[799] *Id.*

[800] *Id.*

[801] *Id.*

[802] *Id.*

c. Response to Comments and Final Rules

Upon consideration of commenters' views, the Commission is adopting Rules 15Fh–4(b)(1) and (2), regarding the "best interests" obligation for an SBS Dealer that acts as an advisor to a special entity regarding a security-based swap, with certain modifications.

Under Rule 15Fh–4(b)(1), as adopted, an SBS Dealer that acts as an advisor to a special entity will have a "duty to make a reasonable determination that any security-based swap or trading strategy involving a security based swap recommended by the security based swap dealer is in the best interests of the special entity." We believe that this language, suggested by a commenter,[804] appropriately interprets the statutory requirements imposed on an SBS Dealer that is acting as an advisor to a special entity.[805] While the Commission is not specifically defining the term "best interests," it is providing further guidance below regarding how an SBS Dealer that acts as an advisor to a special entity can comply with the duty to make a reasonable determination that a security-based swap or security-based swap trading strategy is in the "best interests" of the special entity.

Under Rule 15Fh–4(b)(2), as adopted, the advisor will be obligated to "make reasonable efforts to obtain such information that the security-based swap dealer considers necessary to make a reasonable determination that a security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity." Whether a recommended security-based swap or trading strategy is in the best interests of the special entity is based on information known to the advisor (after it has employed its reasonable efforts under Rule 15Fh–4(b)(2)) at the time the recommendation is made.

Various commenters questioned whether the "best interest" duty was tantamount to, or would give rise to, a "fiduciary duty."[806] The Commission has considered commenters' views and the legislative history in regard to whether Section 15Fh–4 imposes a fiduciary duty.[807] As noted above, Rule 15Fh–4(b)(1), as adopted, requires that an SBS Dealer "make a reasonable determination that any security-based swap or trading strategy involving a security based swap recommended by the security based swap dealer is in the best interests of the special entity." In response to comments, and for clarification, the determination whether a recommended security-based swap or trading strategy is in the "best interests" of the special entity will turn on the facts and circumstances of the particular recommendation and particular special entity. In response to a commenter, and as stated in the Proposing Release, we continue to believe that the "best interests" obligation for an SBS Dealer acting as an advisor to a special entity goes beyond and encompasses the general suitability requirements of Rule 15Fh–3(f).[808] The Commission generally believes that it would be difficult for an SBS Dealer acting as an advisor to a special entity to fulfill its obligations under Rule 15Fh–4(b)(1), as adopted, unless the SBS Dealer, at a minimum: (1) Complies with the requirement of Rule 15Fh–4(b)(2) that it make a reasonable effort to obtain necessary information to make a reasonable determination that a security-based swap or related trading strategy is in the best interests of the special entity;[809] (2) acts in good faith and makes full and fair disclosure of all material risks and characteristics of and any material incentives or conflicts of interest with respect to the recommended security-based swap;[810] and (3) employs reasonable care that any recommendation made to a special entity is suitable taking into account the information collected by the SBS Dealer pursuant to Rules 15Fh–3(f)(1)(ii) and 15Fh–4(b)(2), including the special entity's objectives.[811] In taking reasonable care that any recommendation made to a special entity is suitable, an SBS Dealer acting as an advisor to a special entity should consider, among other things, the fair pricing and appropriateness of the security-based swap or trading strategy, and must act without regard to its own financial or other interests in the security-based swap transaction or trading strategy.[812] As discussed below, this does not prevent an SBS Dealer from negotiating commercially reasonable terms or earning a profit.

In response to commenters' requests for clarification, we do not believe that, to act in the best interests of a special entity, an SBS Dealer acting as an advisor would be required to recommend the "best" of all possible alternatives that might exist.[813] The determination whether a recommended security-based swap is in the "best interests" of the special entity must be based on information known to the SBS Dealer, acting as an advisor, (after it has employed its reasonable efforts under Rule 15Fh–4(b)(2)) at the time the recommendation is made. We believe that a broader requirement could introduce legal uncertainty into the determination of what an SBS Dealer must do to fulfill its obligation under the rule, given the broad range of objectives for which a security-based swap might be used, and how such objectives may vary for different transactions. The Commission believes, however, that generally an SBS Dealer should consider, based on the information about existing alternatives known to the SBS Dealer, any reasonably available alternatives in fulfilling its best interests obligations.

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[803] *Id.*

[804] *See* SIFMA (August 2015), *supra* note 5.

[805] Proposed Rule 15Fh–4(b)(1) generally required an SBS Dealer to "act in the best interests of the special entity."

[806] *See, e.g.*, Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; Johnson, *supra* note 5; ABC, *supra* note 5; BlackRock, *supra* note 5.

[807] In the Senate bill, the business conduct standards provision provided that "a security-based swap dealer that provides advice regarding, or offers to enter into, or enters into a security-based swap with [a Special Entity] shall have a fiduciary duty to the [Special Entity], as appropriate." Restoring American Financial Stability Act of 2010, H.R. 4173, Section 764 (May 20, 2010) (Public Print version as passed in the Senate of the United States May 27 (legislative day, May 26, 2010) (proposed amendments to Section 15F(h)(2)(A) and (B) of the Exchange Act), *available at https://www.congress.gov/bill/111th-congress/house-bill/4173/text/pp*). Instead, Congress adopted the following best interests standard: "Duty.—Any security-based swap dealer that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity." H.R. Rep. No. 111–517, 111th Cong., 2d Sess., p. 423 (June 29, 2010) (Dodd-Frank Act Conference Report). *See also* Section 15F(h)(4)(B) of the Exchange Act.

[808] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5. *See also* Proposing Release, 76 FR at 42417, *supra* note 3. This is the case even if the SBS Dealer is not acting as counterparty to the special entity for which it is acting as an advisor.

[809] Also, as stated above, to comply with its customer-specific suitability obligations under Rule 15Fh–3(f)(1)(ii), an SBS Dealer must have a reasonable basis to believe that a recommended security-based swap or trading strategy involving a security-based swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, an SBS Dealer must have or obtain relevant information regarding the special entity, including its investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy involving a security-based swap. Furthermore, where an SBS Dealer's reasonable efforts to obtain necessary information result in limited or incomplete information, the SBS Dealer must assess whether it is able to make a reasonable determination that a particular recommendation is in the best interests of the special entity.

[810] The Commission believes that to "act in good faith" in this context generally involves taking steps to manage material conflicts of interest in addition to disclosing them.

[811] *See* note 809, *supra* and Rule 15Fh–4(b)(2). An SBS Dealer generally should consider evaluating "best interests" in accordance with policies and procedures that are reasonably designed to prevent violations of the requirement that a recommended swap is in the best interests of the special entity. *See* Rule 15Fh–3(h)(2)(iii) (requiring SBS Entities to have supervisory policies and procedures that are reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder). Furthermore, the Commission has separately proposed that SBS Dealers be required to make and keep current a record that demonstrates their compliance with Rule 15Fh–4, among others, as applicable. *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers; Proposed Rules, Exchange Act Release No. 34–71958, 79 FR 25194 at 25208 (May 2, 2014).

[812] Exercising reasonable care would also require, among other things, undertaking reasonable diligence to understand the potential risks and rewards associated with the recommended security-based swap or trading strategy. *See* Rule 15Fh–3(f)(1)(i).

[813] *See* CFA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

For further clarification in response to comments, we believe that the "best interests" duty would not necessarily preclude an SBS Dealer from acting as a counterparty.[814] However, an SBS Dealer acting in both capacities would be required to comply with the full range of requirements under Rules 15Fh–4 and 15Fh–5, applicable to SBS Dealers acting as advisors and as counterparties to special entities. In addition to the substantive requirements, Rule 15Fh–5(c) would require that the SBS Dealer disclose to the special entity in writing the capacities in which is it acting, and the material differences between its capacities as advisor and counterparty to the special entity.

We also do not believe that the "best interests" duty would prevent an SBS Dealer from negotiating commercially reasonable security-based swap terms in its own interest,[815] or that it would preclude an SBS Dealer from making a reasonable profit or fee from a transaction with a special entity.[816] We do not believe that the profit motive inherent in any security-based swap transaction necessarily precludes an SBS Dealer, acting as an advisor, from fulfilling its "best interests" duty to a special entity, although it raises the potential for material conflicts that would need to be disclosed—particularly when the SBS Dealer is acting as both an advisor and a counterparty to the special entity. A prohibition on receipt of reasonable profits or fees would likely reduce SBS Dealers' willingness to act as advisors to and transact with special entities at the same time, and therefore could limit special entities' access to security-based swap transactions that might be necessary to their particular objectives.

As additional guidance in response to comments,[817] the "best interests" duty would not require the SBS Dealer acting as an advisor to undertake an ongoing obligation to act in the "best interests" of the special entity, unless such obligation is established through contract or other arrangement or understanding (*e.g.*, a course of dealing). As noted above, Rule 15Fh–4(b), as adopted, requires an SBS Dealer to make a reasonable determination, after making reasonable efforts to obtain the necessary information, that a recommended security-based swap or related trading strategy is in the best interests of the special entity. Thus, the "best interests" duty applies only to recommendations by the SBS Dealer. For example, if an SBS Dealer makes a recommendation in connection with a material amendment to a security-based swap or a recommendation to terminate a security-based swap early, the "best interests" duty would apply. However, we note that an SBS Dealer would have an ongoing "best interests" duty if it were to assume the additional responsibility of monitoring a special entity's security-based swap transaction on an ongoing basis.

Commenters have suggested that we apply principles applicable to investment advisers under the Advisers Act in the "best interests" standard of Rule 15Fh–4(b).[818] As noted above in Section II.H.2.c.i., we believe that the protections included in the business conduct rules address the relationships between SBS Dealers and their special entity counterparties for which they act as advisors, so long as their activities are limited to those that would not, under the facts and circumstances, implicate other applicable law. However, as discussed in Section I.E, *supra*, the duties imposed on an SBS Dealer under the business conduct rules are specific to this context, and are in addition to any duties that may be imposed under other applicable law. Thus, an SBS Dealer must separately determine whether it is subject to regulation as a broker-dealer, an investment adviser, a municipal advisor or other regulated entity. We also decline to adopt a commenter's suggestion that we either omit the term "best interests" from the final rules, or state that "best interests" means complying with the fair and balanced communications requirements of Rule 15Fh–3(g) and FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade).[819] We do not believe that either approach would be consistent with the statute, which uses the terms "fair and balanced communications," "fair dealing," and "good faith" in separate provisions, indicating that they impose duties separate and apart from "best interests."[820]

The Commission also has modified the information that an SBS Dealer must "make reasonable efforts to obtain" and consider in making its reasonable determination that a security-based swap or security-based swap strategy is in the "best interests of the special entity." Specifically, Rule 15Fh–4(b)(2) now includes the special entity's hedging, investment, financing, or other stated objectives as information that shall be considered by the SBS Dealer in making this determination. The addition of "hedging" and "other" objectives in Rule 15Fh–4(b)(2)(iii) addresses a commenter's suggestion that these terms be included,[821] and recognizes that there may be a broader set of objectives for a special entity to enter into a security-based swap. The added language expressly recognizes special entities' use of security-based swaps to mitigate risk, as well as other possible uses for security-based swaps that might be necessary for a special entity to achieve these objectives. We believe that requiring an SBS Dealer to make reasonable efforts to obtain information about a wider array of possible investment objectives of special entities will allow SBS Dealers to more accurately determine a special entity's objectives in entering into a security-based swaps, which is one of the factors it must consider when making a best interest determination (as discussed above). Furthermore, as requested by a commenter, this change conforms the obligation under our rules with that under the rules of the CFTC.[822] Such conformity promotes regulatory consistency across the swap and security-based swap markets, particularly among entities that transact in both markets and have already established infrastructure to comply with existing CFTC regulations.

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[814] *See* CFA, *supra* note 5.

[815] *See* SIFMA (August 2015), *supra* note 5. For example, the SBS Dealer may negotiate appropriate provisions relating to collateral and termination rights to manage its risks related to the security-based swap.

[816] *See* CFA, *supra* note 5. Furthermore, as noted throughout this release, the duties imposed on an SBS Dealer under these business conduct rules are specific to this context, and are in addition to any duties that may be imposed under other applicable law. Thus, an SBS Dealer must separately determine whether it is subject to regulation as a broker-dealer, an investment adviser, a municipal advisor or other regulated entity.

[817] *See* SIFMA (August 2015), *supra* note 5.

[818] *See* Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5.

[819] *See* BlackRock, *supra* note 5. We interpret BlackRock's comment as referring to FINRA Rule 2010, (or its predecessors, NYSE Rule 2010 or NASD Rule 2110) which states: "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."

[820] *Compare* Exchange Act Section 15F(h)(3)(C) (requiring business conduct requirements to "establish a duty for security-based swap dealer or major security-based swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith") with Exchange Act Section 15F(h)(4)(B) ("Any security-based swap dealer that acts as an advisor to a special entity shall have a duty to act in the best interests of the special entity").

[821] *See* SIFMA (August 2015), *supra* note 5.

Furthermore, we reject the commenter's request to delete the requirement under proposed Rule 15Fh–4(b)(2)(i) that an SBS Dealer make reasonable efforts to obtain "information regarding the authority of the special entity to enter into a security-based swap." [823] In so doing, we disagree with the commenter's assertion that the requirement under Rule 15Fh–4(b)(2)(i) is "duplicative" of the "know your counterparty" requirement of Rule 15Fh–3(e)(3), which, according to the commenter, already imposes an obligation on SBS Dealers to obtain information about the authority of the special entity to enter into a security-based swap. To the contrary, the know your customer requirements of Rule 15Fh–3(e)(3) require an SBS Dealer to learn "information regarding the authority of any person acting for such counterparty." A determination regarding the authority of any person *acting for a counterparty* (under Rule 15Fh–3(e)(3)) is different from a determination regarding the authority of the *counterparty itself* to enter into a security-based swap itself (under Rule 15Fh–4(b)(2)(i)). The SBS Dealer's duty to act in the best interests of a special entity would encompass the requirement to ensure that a special entity has the requisite authority to enter into an SBS transaction. Moreover, the "know your counterparty" requirements of Rule 15Fh–3(e)(3) only apply to known counterparties.[824] Also, the "know your counterparty" requirements apply only to counterparties, whereas the requirements imposed on SBS Dealers that "act as an advisor" to special entities are not limited to special entities that are counterparties. Accordingly, we continue to believe that requiring SBS Dealers to obtain information regarding the authority of a special entity to enter into a security-based swap is not duplicative, but is necessary to achieving the overarching purpose of the rule: Determining whether a recommended security-based swap or related trading strategy is in the best interests of the special entity.

Lastly, as noted above, commenters requested that we clarify that an SBS Dealer that "acts as an advisor to a special entity" and complies with the "best interests" requirements of these business conduct standards will not necessarily become an ERISA fiduciary under the DOL's proposed (now final) redefinition of the term "fiduciary." [825] As discussed in Section I.D, *supra,* DOL staff has provided the Commission with a statement that:

> It is the Department's view that the draft final business conduct standards do not require security-based swap dealers or major security-based swap participants to engage in activities that would make them fiduciaries under the Department's current five-part test defining fiduciary investment advice. 29 CFR 2510.3–21(c). The standards neither conflict with the Department's existing regulations, nor compel security-based swap dealers or major security-based swap participants to engage in fiduciary conduct. Moreover, the Department's recently published final rule amending ERISA's fiduciary investment advice regulation was carefully harmonized with the SEC's business conduct standards so that there are no unintended consequences for security-based swap dealers and major security-based swap participants who comply with the business conduct standards. As explained in the preamble to the Department's final rule, the disclosures required under the SEC's business conduct rules do not, in the Department's view, compel counterparties to ERISA-covered employee benefit plans to make investment advice recommendations within the meaning of the Department's final rule or otherwise compel them to act as ERISA fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s(h) of the Commodity Exchange Act and section 15F of the Securities Exchange Act of 1934.[826]

4. Antifraud Provisions

a. Proposed Rule 15Fh–4(a)

Proposed Rule 15Fh–4(a) would track the language of Section 15F(h)(4)(A) of the Exchange Act, and prohibit an SBS Entity from: (1) Employing any device, scheme, or artifice to defraud any special entity or prospective customer who is a special entity; (2) engaging in any transaction, practice, or course of business that operates as a fraud or deceit on any special entity or prospective customer who is a special entity; or (3) engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. The first two provisions are specific to an SBS Entity's interactions with special entities, while the third applies more generally.

b. Comments on the Proposed Rule

The Commission received two comment letters on this issue.[827] The first commenter argued that the antifraud provisions of proposed Rule 15Fh–4(a) would be duplicative in light of the general antifraud and anti-manipulation provisions of the existing federal securities laws and proposed Rule 9j–1.[828]

The second commenter argued that, because the antifraud prohibitions of proposed Rule 15Fh–4(a)(3) were modeled on language in the Advisers Act applicable to conduct by investment advisers, and SBS Entities do not typically act as advisers to their counterparties, the SEC should include an affirmative defense against alleged violations of the antifraud prohibitions in its final rules.[829] Specifically, the commenter suggested that the Commission establish an affirmative defense for an SBS Entity that: (1) Did not act intentionally or recklessly in connection with such alleged violation; and (2) complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.[830] The commenter noted that the CFTC included such a provision in its parallel business conduct rules, and urged the Commission to rely on the same considerations that led the CFTC to adopt its affirmative defense.[831]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–4(a) as proposed. However, we are re-titling Rule 15Fh–4 "Antifraud provisions and special requirements for security-based swap dealers acting as advisors to special entities. We also are re-titling Rule 15Fh–4(a) "Antifraud provisions" and Rule 15Fh–4(b) "Special requirements for security-based swap dealers acting as advisors to special entities."

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[822] *Id.* CFTC Regulation § 23.440(c)(2)(iii) states that: "Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity, including . . . information relating to . . . the hedging, investment, financing, or other objectives of the Special Entity." *See* CFTC Adopting Release, 77 FR at 9825, *supra* note 22.

[823] *See* SIFMA (August 2015), *supra,* note 5.

[824] *See* Section II.G.3, *supra.*

[825] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; CFA, *supra* note 5.

[826] *See* Letter from Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor to The Hon. Mary Jo White *et al.,* SEC (Apr. 12, 2016).

[827] *See* Barnard, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[828] *See* Barnard, *supra* note 5. *See also* Prohibition Against Fraud, Manipulation, and Deception in Connection With Security-Based Swaps, Exchange Act Release No. 34–63236, 75 FR 68560 (Nov. 8, 2011).

[829] *See* SIFMA (August 2015), *supra* note 5.

[830] *Id.*

[831] *Id.*

Rule 15Fh–4(a) codifies the statutory requirements of Exchange Act Section 15F(h)(4)(A).[832] Inclusion of the rule in the business conduct standards will provide SBS Entities and their counterparties with easy reference to the antifraud provisions that Congress expressly provided under Section 15F(h)(4) of the Exchange Act. These requirements, which by their terms are applicable to all SBS Entities, apply in addition to those prohibitions imposed by Section 9(j) of the Exchange Act—along with any rules the Commission may adopt thereunder, and any other applicable provisions of the federal securities laws and related rules and regulations. The Commission is not adopting the commenter's recommendation that the final rules incorporate an affirmative "policies and procedures defense." We recognize that the CFTC adopted an express, affirmative defense in its parallel antifraud rules, in part in response to concerns that the statute may impose non-scienter liability for fraud in private rights of action.[833] The Exchange Act, however, does not contain a parallel provision.[834] Moreover, the Commission has considered the concerns raised by commenters and determined not to provide a similar safe harbor from liability for fraud on behalf of SBS Entities. As discussed throughout the release in the context of specific rules, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections, and therefore we do not think it would be appropriate to provide the safe harbor requested by the commenter from liability for fraud. While we are not adopting a safe harbor from liability for fraud, as discussed below in connection with the relevant rules, the Commission has adopted rules that permit reasonable reliance on representations (*e.g.,* Rule 15Fh–1(b)) and, where appropriate, allow SBS Entities to take into account the sophistication of the counterparty (*e.g.,* Rule 15Fh–3(f) (regarding recommendations of security-based swaps or trading strategies)).

5. SBS Entities Acting as Counterparties to Special Entities

a. Scope of Qualified Independent Representative Requirement

i. Proposed Rules

Under Exchange Act Section 15F(h)(5)(A), an SBS Entity that offers to enter into or enters into a security-based swap with a special entity must comply with any duty established by the Commission requiring the SBS Entity to have a "reasonable basis" to believe the special entity has an "independent representative" that meets certain qualifications. Proposed Rules 15Fh–2(c) and 15Fh–5(a) would implement this provision. In particular, proposed Rule 15Fh–2(c) would define an "independent representative," and proposed Rule 15Fh–5(a) would require an SBS Entity that "offers to enter into" or enters into a security-based swap with a special entity to have a "reasonable basis" to believe that the special entity has a "qualified independent representative."

ii. Comments on the Proposed Rule

Application to SBS Dealers and Major SBS Participants

Under proposed Rule 15Fh–5(a), an SBS Dealer or a Major SBS Participant that offers to enter into or enters into an SBS with a special entity must have a reasonable basis to believe that the special entity has a qualified independent representative. Although Exchange Act Section 15F(h)(2)(B) only imposes an express obligation on SBS Dealers to comply with the requirements of Section 15F(h)(5), we proposed to apply the qualified independent representative requirement to Major SBS Participants as well as SBS Dealers because the specific requirements under Section 15F(h)(5)(A) apply by their terms to both a "security-based swap dealer and major security-based swap participant that offers to or enters into a security-based swap with a special entity."[835]

The sole commenter on this issue supported the proposed Rule, and agreed that it should apply to both SBS Dealers and Major SBS Participants.[836]

Application to Any Special Entity

In proposed Rule 15Fh–5(a), we proposed to apply the qualified independent representative requirements to transactions with all special entities. In the Proposing Release, we explained that while Exchange Act Section 15F(h)(5)(A) provides broadly that an SBS Entity that offers to or enters into a security-based swap with a special entity must comply with the requirements of that section, Section 15F(h)(5)(A)(i) on its face would apply these requirements only to dealings only with "a counterparty that is an eligible contract participant within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of the Commodity Exchange Act." A reliance on Section 15Fh(5)(A)(i) read in isolation would lead to an anomalous result in which special entity obligations could apply with respect to entities such as multinational and supranational government entities, which are ECPs "within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of the Commodity Exchange Act," but that do not fall within the definition of special entity in Section 15F(h)(2)(C). Conversely, Section 15Fh(5)(A)(i) read in isolation could lead to special entity obligations not being applied with respect to dealings with state agencies, which are special entities as defined in Section 15Fh(2)(C) but are not ECPs as defined in Section 1a(18)(A)(vii)(I) and (II) of the CEA.[837]

To resolve the ambiguity in the statutory language, we proposed to apply the qualified independent requirement under Section 15F(h)(5) to security-based swap transactions or offers to enter into security-based swap transactions between an SBS Entity and *any* counterparty that is a "special entity" as defined in Section 15F(h)(1)(C). This approach would address the statutory ambiguity by including dealings with a special entity that is an ECP within the meaning of subclause (I) or (II) of clause (vii) of Commodity Exchange Act Section 1a(18).[838] The Proposing Release noted that this reading would be consistent with the categories of special entities mentioned in the legislative history.[839] It also would give meaning to the requirement of Section 15F(h)(5)(A)(i)(VII) concerning "employee benefit plans subject to ERISA," that are not ECPs within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of the Commodity Exchange Act but are included in the category of retirement plans identified in the definition of special entity.[840]

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[832] This language mirrors the language in Sections 206(2) and 206(4) of the Advisers Act, which does not require scienter to prove liability. *See SEC* v. *Steadman,* 967 F.2d 636, 647 (D.C. Cir. 1992). The court in *Steadman* analogized Section 206(4) of the Advisers Act to Section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter. *See id.,* citing *Aaron* v. *SEC,* 446 U.S. 680 (1980). The Steadman court concluded that: "[S]ection 206(4) uses the more neutral 'act, practice, or course or business' language. This is similar to [Securities Act] section 17(a)(3)'s 'transaction, practice, or course of business,' which 'quite plainly focuses upon the effect of particular conduct . . . rather than upon the culpability of the person responsible.' Accordingly, scienter is not required under section 206(4), and the SEC did not have to prove it in order to establish the appellants' liability . . . ." *SEC* v. *Steadman,* 967 F.2d at 647 (internal citations omitted). The *Steadman* court observed that, similarly, a violation of Section 206(2) of the Adviser Act could rest on a finding of simple negligence. *Id.* at 642 note 5.

[833] *See* CFTC Adopting Release, 77 FR at 9752, *supra* note 21 ("Even if the Commission were to limit the rule to require proof of scienter and apply the rule only when a swap dealer is acting as an advisor to a Special Entity, that would not restrict a court from taking a plain meaning approach to the language in Section 4s(h)(4) in a private action under Section 22 of the CEA").

[834] *See also* Proposing Release, 76 FR 42401, fn. 44, *supra* note 3 ("Section 15F(h) of the Exchange Act does not, by its terms, create a new private right of action or right of rescission, nor do we anticipate that the proposed rules would create any new private right of action or right of rescission").

[835] *See* 15 U.S.C. 78o–10(h)(5)(A).

[836] *See* NAIPFA, *supra* note 5.

[837] *See* Proposing Release, 76 FR at 42426, *supra* note 3.

The Commission received one comment letter that addressed the question of whether proposed Rule 15Fh–5(a) should apply to security-based swap transactions with any special entity.[841] According to the commenter, proposed Rule 15Fh–5(a) was overly broad in scope and ignored the limiting language of Section 15F(h)(5)(A). This commenter suggested interpreting the requirement as applying to only those referenced governmental entities that are special entities." [842]

Application to "Offers"

As stated above, proposed Rule 15Fh–5(a) would apply to an SBS Dealer or Major SBS Participant that "offers to enter into" or enters into a security-based swap with a special entity. The Commission requested comment regarding whether the phrase "offers to enter into" a security-based swap was sufficiently clear, and if not, how the requirement should be clarified.[843] Three commenters responded to this request.[844]

One commenter suggested that the "offer" stage of a security-based swap transaction would often be too early for the counterparty to ensure that the independent representative requirement was satisfied.[845] Instead, the commenter argued that the independent representative requirement should be satisfied if the counterparty had an independent representative at the time the transaction was executed.[846] A second commenter recommended that the Commission exclude preliminary negotiations from the definition of "offer," and that the communication of an interest in trading a security-based swap should only be viewed as an "offer" when, based on the relevant facts or circumstances, the communication was "actionable" or "firm." [847] A third commenter asked that the Commission, like the CFTC, clarify the term "offer" to mean an "offer to enter into an SBS that, if accepted, would result in a binding contract under applicable law." [848]

"Reasonable Basis"

The Commission additionally sought comment regarding the degree of inquiry required for an SBS Entity to form a "reasonable basis" to believe the special entity was represented by a qualified independent representative. Three commenters expressed concern with the additional duties of inquiry and diligence imposed on SBS Entities under proposed Rule 15Fh–5(a).[849] One of these commenters argued that the CFTC's proposed requirement that a Swap Dealer perform substantial diligence to confirm a swap advisor's qualifications could pose a serious conflict of interest, give the Swap Dealer too much power, and ultimately interfere with, prove more costly for, and be problematic to state or local governments.[850] Another commenter similarly argued that an inherent conflict of interest existed in granting one party to a transaction the authority to effectively determine who has the requisite qualifications to represent the other party.[851] The second commenter would impose additional due diligence obligations on SBS Entities before they could rely on special entities' representations regarding the qualifications of representatives, even where the SBS Entity does not have information that would cause a reasonable person to question the accuracy of the representations.[852] The commenter conceded that requiring such additional diligence might limit the willingness or ability of SBS Entities to provide special entities with access to security-based swaps. However, it argued that, in the absence of such diligence, special entities' access to security-based swaps should be limited to the extent suitability is in question.[853]

Other commenters expressed a range of views in response to our request for comment on whether an SBS Entity should be able to rely on representations to form the necessary "reasonable basis" for believing that a special entity counterparty is represented by a qualified independent representative. One commenter argued that no particular level of specificity should be required in the representations, and that the SBS Dealer should not be required to conduct further diligence before relying on the special entity's representations, as "any such diligence would interfere with the relationship between the special entity and its independent advisor and could result in the SBS Dealer second-guessing the special entity's choice of representative." [854] Another commenter argued that an SBS Dealer should be *required* to rely on the representations of a special entity concerning the qualifications of its independent representative, absent actual knowledge of facts that clearly contradict material aspects of the representative's purported qualifications.[855]

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[838] *Id. See also* proposed Rule 15Fh–5(a).

[839] *See* H.R. Conf. Rep. 111–517 (June 29, 2010) ("When *acting as counterparties to a pension fund, endowment fund, or state or local government,* dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.") (emphasis added).

[840] *See* Section 15F(h)(1)(C)(iii) of the Exchange Act.

[841] *See* Ropes & Gray, *supra* note 5.

[842] *Id.* The commenter suggested two other possible alternatives for resolving the statutory ambiguity: "(i) interpreting the de facto independent representative requirements as applying to both those referenced governmental entities that are special entities and those that are not, (ii) interpreting the independent representative requirement to be generally inapplicable (as clearly most special entities were not intended to be covered in the reference)" but expressed a preference for including governmental entities that are special entities "absent clarification from Congress."

[843] *See* Proposing Release, 76 FR at 42426, *supra* note 3.

[844] *See* APPA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[845] *See* APPA, *supra* note 5.

[846] *Id.*

[847] *See* FIA/ISDA/SIFMA, *supra* note 5.

[848] *See* SIFMA (August 2015), *supra* note 5.

[849] *See* MFA, *supra* note 5; GFOA, *supra* note 5; CalPERS, *supra* note 5.

[850] *See* GFOA, *supra* note 5.

[851] *See* CalPERS, *supra* note 5. This commenter therefore recommended an approach that would permit a special entity to choose between either relying on the Commission's proposed framework, or relying on an alternative approach under which it would be permitted to enter into off-exchange security-based swap transactions with an SBS Entity if the special entity had a representative, whether internal or a third party, that had been certified as able to evaluate security-based swap transactions. The commenter contemplated that the certification process would involve passage of a proficiency examination to be developed by the Commission or FINRA "or another recognized testing organization." A certified independent representative would be required to complete periodic continuing education. *Id.*

[852] *See* NAIPFA, *supra* note 5.

[853] *Id.*

[854] *See* BlackRock, *supra* note 5.

[855] *See* SIFMA (August 2011), *supra* note 5. The commenter asserted that requiring an SBS Dealer to

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One commenter suggested adopting a presumption that the special entity's selection of independent representative was acceptable if the special entity represents to the SBS Entity that the representative satisfies the criteria in Exchange Act Section 15F(h)(5)(A)(i).[856]

Two other commenters supported the actual knowledge standard because they believe the reasonable person standard in practice could require an SBS Entity to perform substantial due diligence to rely on representations.[857] One commenter noted that this additional due diligence could reduce the number of SBS Entities willing to contract with special entities, and could increase the cost of security-based swaps for those persons.[858] The other expressed concern that additional due diligence, in the context of the qualifications of a special entity's independent representative, would be intrusive, time consuming and unnecessary, and would "come very close to having the SBS Dealer 'approve' the special entity's representative." [859] A third commenter expressed similar concerns, noting that absent actual knowledge that a representation is incorrect, SBS Dealers should not be able to second-guess a special entity's selection of a representative.[860]

Another commenter supported permitting an SBS Dealer to rely on a special entity's representation that its independent representative met the statutory and regulatory requirements, unless the SBS Dealer had reason to believe that the special entity's representations with respect to its independent representative were inaccurate.[861]

After the adoption of the CFTC's final rules, one commenter urged the Commission to adopt the CFTC's reasonable person approach, under which an SBS Entity would be deemed to have a reasonable basis to believe the special entity has a qualified independent representative when it relies on written representations that the special entity's representative meets the criteria for a qualified independent representative.[862] Alternatively, in the ERISA context, the commenter suggested that an SBS Entity be deemed to have a reasonable basis to believe a special entity subject to ERISA has a representative that satisfies the requirements for a qualified independent representative when it relies on written representations that the representative is a fiduciary as defined in Section 3 of ERISA.[863] The commenter's suggested modifications were intended to harmonize the SEC's standard with that adopted by the CFTC.[864]

Another commenter requested that the Commission clarify that any representations made by a special entity or its representative to satisfy the rules do not give any party any additional rights, such as rescission or monetary compensation (*e.g.,* if the representations turn out to be incorrect).[865]

iii. Response to Comments and Final Rule

After consideration of the comments, we are adopting Rule 15Fh–5(a), subject to the modifications described below.

Application to SBS Dealers and Major SBS Participants

As a preliminary matter, we continue to believe and agree with the commenter that Rule 15Fh–5(a) should apply to both SBS Dealers and Major SBS Participants.[866] As discussed in Section II.C. above, in making this determination, the Commission recognizes that the statutory language of the business conduct standards generally does not distinguish between SBS Dealers and Major SBS Participants. Where the statute does make that distinction, the Commission also makes that distinction in the corresponding rule.[867] Here, we believe Congress intended to impose the independent representative requirement equally with respect to SBS Dealers and Major SBS Participants, since the specific requirements under Section 15F(h)(5)(A) of the Exchange Act apply by their terms to both "security-based swap dealer[s] and major security-based swap participant[s] that offer[ ] to or enter[ ] into a security-based swap with a special entity." [868] We also believe that the protections of Rule 15Fh–5 should inure equally to those special entities that transact with SBS Dealers as well as those that transact with Major SBS Participants.

Application to Any Special Entity

Moreover, the Commission continues to believe that the qualified independent representative requirements in Rule 15Fh–5 should apply whenever an SBS Entity acts as a counterparty to any special entity. We acknowledge the commenter's suggestion that the Commission "give appropriate effect to the limiting language in Exchange Act Section 15F(h)(5)(A)" regarding the types of special entities to which the independent representative requirement applies.[869] However, given the ambiguity between the language of Sections 15F(h)(2)(C) and 15F(h)(5)(A)(i), we believe that our interpretation is appropriate and promotes a more consistent reading of both provisions of the statute, providing protections to all special entities.[870]

This interpretation also gives meaning to the requirement of Section 15F(h)(5)(A)(i)(VII) concerning "employee benefit plans subject to ERISA." Although these benefit plans are not ECPs within the meaning of subclause (I) or (II) of clause (vii) of section 1a(18) of the Commodity Exchange Act, they are included in the category of plans identified as special entities in Exchange Act section 15F(h)(2)(C). For these reasons, we believe Rule 15Fh–5(a) should apply to any special entity as counterparty.

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undertake an independent due diligence investigation into representative's qualifications would impose upon the SBS Dealer a duty to second-guess the special entity's own assessment of its representative and provide the SBS Dealer with the ability to trump a special entity's choice of asset manager. According to the commenter, this could result in a reduced number of security-based swap counterparties for special entities, as SBS Dealers would likely limit transactions with special entities to avoid the potential liability, cost, delay, and uncertainty arising from this added responsibility.

[856] *See* ABA Committees, *supra* note 5. That presumption would be voidable only if one or more senior representatives of the SBS Entity with expertise in security-based swap transactions possessed actual knowledge that a representation regarding the independent representative's qualifications was false. In that situation, the Special Entity's senior representative must present his or her determination promptly in writing to the special entity's Chief Investment Officer and Chair of the Board, or equivalent person.

[857] *See* APPA, *supra* note 5; BlackRock, *supra* note 5.

[858] *See* APPA, *supra* note 5.

[859] *See* BlackRock, *supra* note 5.

[860] *See* ABC, *supra* note 5. According to the commenter, without such a bright-line rule, SBS Dealers might face litigation initiated by ERISA plans for approving a representative who is subsequently determined to lack needed expertise, or by the representatives whom they have chosen to disqualify. This potential liability would ultimately discourage SBS Dealers from transacting with ERISA plans altogether.

[861] *See* CCMR, *supra* note 5.

[862] *Id.*

[863] *Id.*

[864] *Id.*

[865] *See* FIA/ISDA/SIFMA, *supra* note 5.

[866] *See* NAIPFA, *supra* note 5.

[867] For example, the requirements under Exchange Act Section 15F(h)(4)(B) apply only to an SBS Dealer that acts as an advisor to a special entity, a distinction that is reflected in Rule 15Fh–4(b).

[868] *See* 15 U.S.C. 78o–10(h)(5)(A).

[869] *See* Ropes & Gray, *supra* note 5.

[870] *See* Proposing Release, 76 FR at 42426, *supra* note 3. *See also* H.R. Conf. Rep. 111–517 (Jun. 29, 2010) ("When *acting as counterparties to a pension fund, endowment fund, or state or local government,* dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.") (emphasis added).

Application to Offers

The Commission continues to believe that, consistent with statutory language, the independent representative requirement of the business conduct rules should be triggered when an "offer" to enter into a security-based swap is made. We disagree with the commenter that applying Rule 15Fh–5(a) at the offer stage is premature.[871] The rules are intended to provide benefits to special entities by, among other things, requiring that a special entity has a qualified independent representative that undertakes a duty to act in its best interests in determining whether to enter into a security-based swap. The benefits of these protections could be lost if the rule were to require only that the special entity counterparty have an independent representative at the time the transaction is executed.[872]

Some commenters argued that the appropriate definition of the term "offer" should be consistent with contract law, and that a communication should only be considered an offer when, based on the relevant facts and circumstances, it is "actionable" or "firm." [873] The Commission agrees with the commenter that the term "offer" for purposes of the independent representative requirement of these business conduct rules means an "offer to enter into a security-based swap that, if accepted, would result in a binding contract under applicable law." [874] Given that the relationship between the SBS Entity and the counterparty is defined and shaped by contract (*e.g.,* generally a master agreement and credit documents), we believe that the contractual interpretation is the appropriate interpretation in this context. This interpretation is also the same as the CFTC's interpretation of an offer to enter into a swap and would harmonize the scope of the term offer for purposes of the independent representative requirement of these business conduct rules.[875] We believe that this harmonization will result in efficiencies for entities that have already established infrastructure to comply with the CFTC standard.

Whether preliminary negotiations would be deemed an "offer" will depend upon the facts and circumstances and details of the communication.[876] For example, if the preliminary communication contains enough details (or if taken in the context of several communications) that, if accepted, would result in a binding contract, it likely may be an "offer" under the rule.

Reasonable Basis

The Commission recognizes and believes it appropriate that Rule 15Fh–5(a) imposes on SBS Entities a duty of inquiry to form a reasonable basis to believe the special entity has a qualified independent representative. The amount of due diligence the SBS Entity must perform to form a reasonable basis to believe the independent representative meets a particular qualification will depend upon the particular facts and circumstances. For example, if the SBS Entity has no prior dealings or familiarity with the particular independent representative, it will likely require more diligence on the part of the SBS Entity than a transaction with an independent representative that the SBS Entity has had numerous recent dealings in various different contexts. Furthermore, if the SBS Entity has dealt with the independent representative in other contexts, but not necessarily in the context of a security-based swap, it may require some limited diligence to form a reasonable basis regarding the requisite qualifications.

The Commission agrees, however, with the concerns of commenters that requiring SBS Entities to perform substantial due diligence regarding the qualifications of independent representatives may provide SBS Entities with the ability to second guess or negate the special entity's choice of independent representative, which may generally increase transaction costs for security-based swaps with special entities, and allow SBS Entities to exert undue influence over the special entity's selection of an independent representative.[877] To address these concerns, final Rule 15Fh–1(b), as discussed in Section II.D, allows SBS Entities to reasonably rely on written representations regarding the qualifications and independence of special entities' representatives.[878] This generally comports with an SBS Entity's heightened standard of care when transacting with special entities, while avoiding the potential conflict of interest and increased transaction costs that could result if SBS Entities effectively second-guessed special entities' choice of independent representatives. In addition, we are adopting safe harbors as discussed below, pursuant to which an SBS Entity will be deemed to have a reasonable basis to believe that the special entity has a representative that meets the qualification and independence requirements of Rule 15Fh–5(a). We believe the availability of the safe harbor also addresses the concerns of certain commenters that SBS Entities not exert undue influence on the special entity's selection of representative.[879]

The Commission acknowledges one commenter's recommended approach that would permit a special entity to choose between either: (1) Relying on the Commission's proposed framework regarding a reasonable basis to believe the qualifications of the independent representative; or (2) relying on an alternative approach under which it would be permitted to enter into off-exchange security-based swap transactions with an SBS Entity if the special entity had a representative, whether internal or a third party, that had been certified as able to evaluate security-based swap transactions. The commenter contemplated that the certification process would involve the development and implementation of a proficiency examination by the Commission or FINRA "or another recognized testing organization," and that a certified independent representative would be required to complete periodic continuing education.[880] We do not believe that this suggested alternative would appropriately provide the protections to special entities that the statute and our proposed Rule 15Fh–5 were designed to provide. First, we believe that this alternative would effectively permit special entities to opt out of the express protections that the rules are intended to provide. In addition, we are not aware of the existence of a certification process as described by the commenter, and we did not propose and are not adopting such a process.[881]

As with final Rule 15Fh–2(a), we have determined to adopt Rule 15Fh–5(a) in a bifurcated format to avoid potential conflict with ERISA and DOL regulations, as well as to more closely harmonize with existing CFTC business conduct rules. Rule 15Fh–5(a)(1), as adopted, requires an SBS Entity that offers to enter into or enters into a security-based swap with a special entity other than an ERISA special entity to form a reasonable basis to believe that the special entity has a qualified independent representative. Rule 15Fh–5(a)(2), as adopted, requires an SBS Entity that offers to enter into or enters into a security-based swap with an ERISA special entity to have a reasonable basis to believe that the special entity has a fiduciary, as defined in Section 3 of ERISA. By adopting separate criteria for the independent representatives of ERISA and non-ERISA special entities, the Commission is addressing the concerns of numerous commenters that the business conduct standards, if adopted without regard for the potential regulatory intersections of ERISA, could cause confusion and unintended consequences for SBS Entities dealing with ERISA plans.[882] In addition, this change will provide greater consistency with the parallel CFTC rule, which will result in efficiencies for SBS Entities that have already established infrastructure to comply with the CFTC rule.

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[871] *See* APPA, *supra* note 5.

[872] *Id.*

[873] *See* FIA/ISDA/SIFMA, *supra,* note 5. *See also* SIFMA (August 2015), *supra* note 5.

[874] *See* SIFMA (August 2015), *supra* note 5.

[875] *See* CFTC Adopting Release at 9741.

[876] *See* FIA/ISDA/SIFMA, *supra,* note 5.

[877] *See* MFA, *supra* note 5; GFOA, *supra* note 5.

[878] *See* Rule 15Fh–1(b).

[879] *See e.g.,* CalPERS (August 2011) *supra* note 5.

[880] *See* CalPERS, *supra* note 5.

[881] However, to the extent that such a proficiency examination were created, the results of the examination could inform the SBS Entity's assessment of the qualifications of the independent representative.

The newly bifurcated rule, detailing the requisite criteria for an SBS Entity to form a reasonable basis to believe that ERISA and non-ERISA special entities have qualified independent representatives, is discussed in greater detail below.

b. Qualified Independent Representative

i. Proposed Rule

Proposed Rule 15Fh–5(a)(6) would require an SBS Entity to have a reasonable basis to believe that, in the case of a special entity that is an employee benefit plan subject to ERISA, the independent representative was a "fiduciary" as defined in section 3(21) of that Act (29 U.S.C. 1002).[883] The proposed rule was not intended to limit, restrict, or otherwise affect the fiduciary's duties and obligations under ERISA.[884]

The Proposing Release solicited feedback regarding any specific requirements that should be imposed on SBS Entities with respect to this obligation, as well as what other independent representative qualifications might be deemed satisfied if an independent representative of an employee benefit plan subject to ERISA, is a fiduciary as defined in section 3 of ERISA.

ii. Comments on the Proposed Rule

The Commission received six comment letters advocating a presumption of qualification for ERISA plan fiduciaries, since ERISA already imposes fiduciary duties upon the person who decides whether to enter into a security-based swap on behalf of an ERISA plan, and imposes on this person a statutory duty to act in the best interests of the plan and its participants, thereby prohibiting certain self-dealing transactions.[885] According to these commenters, the Commission's proposed standards would be unnecessary, redundant, would overlap with ERISA's standards, and would only serve to increase the administrative burden and cost on SBS Entities without any corresponding benefit.[886]

To address the potential conflict with ERISA standards, one commenter suggested that the Commission's definition of "independent representative" should be inapplicable to ERISA plans, and that the Commission should merely cross-reference the requirements under ERISA for ERISA representatives.[887]

Another commenter supported the presumptive qualification for ERISA plan fiduciaries, provided that the plan satisfied a minimum $1 billion net asset requirement for institutional investor organizations.[888] The commenter asserted that no public policy objective would be achieved by permitting an SBS Entity to reject a risk manager fiduciary selected by a sophisticated institutional investor organization with over $1 billion in net assets, which did not require the protections of the rules.[889]

Since the adoption of the CFTC's final rules, another commenter recently advocated for the separate treatment of independent representatives of special entities subject to ERISA.[890] Under this commenter's proposal, an SBS Entity that transacts with a special entity subject to Title I of ERISA must have a reasonable belief that the qualified independent representative is a fiduciary, as defined in Section 3 of ERISA.[891] An SBS Entity that transacts with a non-ERISA special entity would be required to form a reasonable belief that the special entity has a qualified independent representative, defined by specific criteria. The commenter's proposed modification recognizes "the unique fiduciary regime already applicable to such special entities," and harmonizes the Commission's criteria for qualified independent representatives with those of the CFTC.[892]

iii. Response to Comments and Final Rule

After consideration of the comments, the Commission is reformulating the rules to reflect a separate treatment for transactions with special entities subject to ERISA, and transactions with special entities other than those subject to ERISA. Toward this end, we have bifurcated Rule 15Fh–5(a) into parts (a)(1) (applicable to dealings with special entities other than those subject to ERISA), and (a)(2) (applicable to dealings with special entities subject to ERISA).

Under Rule 15Fh–5(a)(1), as adopted, an SBS Entity that transacts with a special entity that is not subject to ERISA must have a reasonable basis to believe that the special entity has a qualified independent representative. As defined in the rule, a qualified independent representative is a representative who: Has sufficient knowledge to evaluate the transaction and risks; is not subject to a statutory disqualification; undertakes a duty to act in the best interests of the special entity; makes appropriate and timely disclosures to the special entity of material information concerning the security-based swap; will provide written representations to the special entity regarding fair pricing and the appropriateness of the security-based swap; in the case of a special entity defined in 15Fh–2(2) or (5), is subject to pay to play rules of the Commission, the CFTC, or a SRO subject to the jurisdiction of the Commission or the CFTC; and is independent of the SBS Entity. These qualifications are addressed, separately, in Section II.H.7, *infra*.

Under new Rule 15Fh–5(a)(2), (formerly proposed Rule 15Fh–5(a)(6)), an SBS Entity that transacts with a special entity subject to ERISA must have a reasonable basis to believe that the special entity has a representative that is a fiduciary, as defined in Section 3 of ERISA.[893] In this regard, the SBS Entity need not undertake further inquiry into the ERISA fiduciary's qualifications. Such a presumption is based on the pre-existing, comprehensive federal regulatory regime governing ERISA fiduciaries.[894]

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[882] *See* Section I.D., *supra*. *See also* ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[883] *See* Section 15F(h)(5)(A)(i)(VII) of the Exchange Act, 15 U.S.C. 78o–10(h)(5)(A)(i)(VII). *See* note 225, *supra* and related text regarding an SBS Entity's reliance on a representation from the special entity to form this reasonable basis.

[884] *See* notes 99, 198 and 189, *supra* regarding the DOL's proposal to amend definition of "fiduciary" for purposes of ERISA.

[885] *See* ABA Committees, *supra* note 5; ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[886] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5.

[887] *See* ABC, *supra* note 5.

[888] *See* ABA Committees, *supra* note 5.

[889] *Id.*

[890] *See* SIFMA (August 2015), *supra* note 5.

[891] *Id.*

[892] *Id.*

[893] 29 U.S.C. 1002.

The Commission agrees with commenters that ERISA fiduciaries should be presumptively deemed qualified as special entity representatives,[895] particularly because an ERISA fiduciary is already required by statute and regulations to, among other things, act with prudence and loyalty when evaluating a transaction for an ERISA plan.[896] Moreover, as several commenters noted, to overlap existing ERISA standards with the business conduct standards would be unnecessary, redundant, and would unnecessarily increase administrative costs for SBS Entities.[897]

This bifurcated rule is designed to address the commenter's concerns regarding the need to align the Commission's treatment of ERISA plans with that of the CFTC,[898] and will reflect the potential intersection of the business conduct rules with the comprehensive framework of regulation under ERISA. Specifically, as discussed above in Section I.D., *supra*, the bifurcated format of the rule addresses the concerns of numerous commenters that the intersection between ERISA's existing fiduciary regulation and the business conduct standards could lead to conflict and unintended consequences for SBS Entities transacting with ERISA special entities, up to and including the preclusion of ERISA plans from participating in security-based swap markets in the future.[899] By providing separate means for SBS Entities to comply with the rules when transacting with ERISA and non-ERISA special entities, the final rule will avoid the potential conflict between the comprehensive framework of regulation under ERISA and business conduct rule regimes.

However, the Commission declines the commenter's suggestion to exclude ERISA plans with a minimum net asset requirement from the requirements of the rule.[900] Rule 15Fh–5 is designed to ensure that special entities are represented by a qualified independent representative pursuant to the statutory requirement. The Commission does not believe that it is appropriate in this context to provide an exception to ERISA plans from the protections of representation by a qualified and independent representative based on a net asset threshold. Different entities will have differing levels of understanding of the security-based swap market, which may or may not be impacted by the amount of their net assets. More generally, the rules are intended to provide certain protections to special entities, and we think it appropriate to apply the rules so that special entities receive the benefits of those rules.

c. Definition of "Independent Representative"

i. Proposed Rule

As noted above, an SBS Entity must have a reasonable basis to believe that a special entity has a "qualified independent representative." Proposed Rule 15Fh–2(c) would establish parameters for the term "independent representative" of a special entity.

For instance, proposed Rule 15Fh–2(c)(1) would generally require that a representative of a special entity be "independent" of the SBS Entity that is the counterparty to a proposed security-based swap. Proposed Rule 15Fh–2(c)(2) would provide that a representative of a special entity is "independent" of an SBS Entity if the representative does not have a relationship with the SBS Entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative. In the Proposing Release, the Commission noted that the SBS Entity should obtain the necessary information to determine if, in fact, a relationship existed between the SBS Entity and the independent representative that could impair the independence of the representative in making decisions that affect the SBS Entity.

Proposed Rule 15Fh–2(c)(3) would deem a representative of a special entity to be independent of an SBS Entity where two conditions are satisfied: (i) The representative is not and, within one year, was not an associated person of the SBS Entity; and (ii) the representative had not received more than ten percent of its gross revenues over the past year, directly or indirectly, from the SBS Entity. This latter restriction would apply, for example, with respect to revenues received as a result of referrals by the SBS Entity. It was intended to encompass situations where a representative was hired by the special entity as a result of a recommendation by the SBS Entity. The restriction would also apply to revenues received, directly or indirectly, from associated persons of the SBS Entity.

In order for an SBS Entity to reasonably believe that the independent representative received less than ten percent of its gross revenue over the past year from the SBS Entity, the Commission noted that the SBS Entity would likely need to obtain information regarding the independent representative's gross revenues from either the special entity or independent representative.

ii. Comments on the Proposed Rule Independence From the Special Entity

The Commission requested comment on whether an independent representative must be independent of the special entity entering into the security-based swap, or whether the representative need only be independent of the SBS Entity. All five commenters agreed that the independent representative need only be independent from the SBS Entity, and emphasized that the intent of the proposed rule was to ensure a special entity received advice from someone in no way affiliated with an SBS Entity.[901]

One commenter, representing two trade associations for municipal power producers, argued that the intended benefit of the proposed independent representative requirement was to ensure that a special entity receives security-based swap advice from a person other than the SBS Entity—not to force special entities to hire third-parties as independent representatives.[902] The commenter noted that although many municipal power producers rely on third-party advisors when entering interest-rate swaps, they have internal experts to advise them on energy contracts.

Another commenter asserted that the legislative history for Dodd-Frank indicated that a representative's "independence" referred to its independence from the dealer or broker—not its independence from the special entity.[903] The commenter pointed out that Congress specifically recognized the possibility that special entities would use an in-house risk specialist, and that the proposed rules seemed to incorporate this assumption.[904]

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[894] *See* 29 U.S.C. 1001 *et seq.;* History of EBSA and ERISA, *available at http://www.dol.gov/ebsa/aboutebsa/history.html.*

[895] *See* ABA Committees, *supra* note 5; ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[896] *See supra* notes 786 and 799 and accompanying text.

[897] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5.

[898] *See* SIFMA (August 2015), *supra* note 5.

[899] *See, e.g.*, ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; IDC, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5; Johnson, *supra* note 5.

[900] *See* ABA Committees, *supra* note 5.

[901] *See* APPA, *supra* note 5; Ropes & Gray, *supra* note 5; BlackRock, *supra* note 5; GFOA, *supra* note 5; ABA Committees, *supra* note 5.

[902] *See* APPA, *supra* note 5.

[903] *See* ABA Committees, *supra* note 5.

Standards for "Independence"

The Commission solicited comment regarding whether to adopt a different test for a representative's independence, or whether the definition of "independent representative" should exclude certain categories of associated persons. Eleven comment letters addressed the independence test in proposed Rule 15Fh–2(c)(2)–(3).[905]

Four commenters argued that the proposed rule would not sufficiently ensure a representative's independence.[906] For instance, one commenter suggested that the one-year prohibition on a representative being an associated person of the SBS Entity be extended to two years.[907] This commenter also recommended that representatives who receive any compensation of any kind, directly or indirectly, from an SBS Entity during the prior year be disqualified.[908] According to this commenter, representatives and associated persons should be barred from, directly or indirectly, working for or receiving compensation from any SBS Entities for one year to act as an independent representative for any special entity.[909]

Another commenter argued that under the proposed rule, a representative might be deemed to be independent even if he or she "worked with the SBS Entity as recently as a year ago, was recommended by the SBS Entity, has a direct business relationship with the SBS Entity that makes the representative highly financially dependent on that entity, and earns more of its revenues from the SBS Entity than from the Special Entity he or she purports to represent." [910] This commenter also noted that, under the proposed rule, a representative could earn virtually all of its gross revenues from various SBS Entities, so long as no more than ten percent originated from the entity on the other side of the transaction. For these reasons, the commenter urged the Commission to adopt instead the version of the independence standard proposed by the CFTC, under which a representative would be deemed to be independent if: "(1) the representative is not and, within one year, was not an associated person of the swap dealer or major swap participant, within the meaning of Section 1a(4) of the Act; (2) there is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant; and (3) the representative does not have a material business relationship with the swap dealer or major swap participant, provided however, that if the representative received any compensation from the swap dealer or major swap participant, the swap dealer or major swap participant must ensure that the Special Entity is informed of the compensation and the Special Entity agrees in writing, in consultation with the representative, that the compensation does not constitute a material business relationship." [911]

Similarly, since the adoption of the CFTC's final business conduct rules, one commenter has argued that the Commission should harmonize its standards of independence with those of the CFTC, replacing the SEC's restriction on revenues received by the independent representative from the SBS Entity with the following qualifications: (1) The representative is not, and within one year of representing the special entity in connection with the security-based swap, was not an associated person of the SBS Entity; (2) there is no principal relationship between the special entity's representative and the SBS Entity; (3) the representative provides timely and effective disclosures to the special entity of all material conflicts of interest, complies with policies and procedures designed to mitigate conflicts of interest, is not directly or indirectly controlled by the SBS Entity, and does not receive referrals, recommendations, or introductions from the SBS Entity within one year of representing the special entity in connection with the security-based swap.[912] As the commenter asserted, "the CFTC's standard has, in our members' experiences, proved sufficient to ensure the independence of special entity representatives and mitigate possible conflicts of interest, while also establishing an objective standard that special entities can apply in practice. As a result, we believe harmonization would achieve the proposed rules' intended objective while also minimizing the extent to which SBS Entities and special entities need to incur significant additional costs." [913]

A third commenter suggested that the Commission revise the independence test for special entity representatives by: (1) Using ERISA standards in assessing the independence of a representative (but rejecting the DOL's fiduciary standard, under which a fiduciary may not derive more than 1% of its annual income from a party in interest and its affiliates); (2) considering a representative's relationships with an SBS Entity on behalf of multiple special entities, including the representative's relationships with an SBS Entity outside of the security-based swap transaction at issue; (3) including the revenues of an independent representative's affiliates in applying the gross revenues test; (4) decreasing the ten-percent gross revenue threshold; and (5) adopting a two-year timeframe (rather than one year) to determine whether a representative is independent of the SBS Entity.[914] The commenter argued that an independent representative should be permitted to receive compensation from the proceeds of a security-based swap, so long as the compensation was authorized by, and paid at the written direction of, the special entity.[915] However, the commenter did not believe that a special entity should be allowed to consent to an independent representative's conflicts of interest, even if fully disclosed, as such conflicts might still affect the independence of the representative.[916]

The sole commenter that supported the independence test as proposed did so on the grounds that market participants would benefit from the certainty of its safe harbor.[917]

Another commenter argued that the proposed rules' definition of "independent representative" should not apply to ERISA plans, as ERISA already defines the criteria for "independence" of a representative.[918] According to this commenter, if a plan's representative is not independent of the plan's counterparty, the transaction violates the prohibited transaction rules under ERISA section 406(b). Rather than adopt such overlapping regulations, the commenter suggested cross-referencing the independence requirements under ERISA. Otherwise, the prohibition on investment managers who receive revenues from SBS Dealers from serving as independent representatives could cause plans to lose their best investment managers and counterparties. Moreover, the commenter argued that "the administrative burden of applying the gross revenue test could in many cases be enormous at best and simply unworkable at worst." [919]

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[904] *Id.*

[905] *See* ABC, *supra* note 5; NABL, *supra* note 5; NAIPFA, *supra* note 5; AFSCME, *supra* note 5; Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[906] See AFSCME, *supra* note 5; Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; NAIPFA, *supra* note 5.

[907] *See* Better Markets (August 2011), *supra* note 5.

[908] *Id.*

[909] *Id.*

[910] *See* CFA, *supra* note 5.

[911] *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638, 80660 (Dec. 22, 2010) ("CFTC Proposing Release").

[912] *See* SIFMA (August 2015), *supra* note 5.

[913] *Id.*

[914] *See* NAIPFA, *supra* note 5.

[915] *Id.*

[916] *Id.* Nor did the commenter believe that an SBS Entity should be required to have a reasonable basis to believe that the representative would make the appropriate and timely disclosures of any potential conflicts of interest.

[917] *See* NABL, *supra* note 5.

[918] *See* ABC, *supra* note 5.

However, the majority of commenters urged the Commission to modify the proposed independence standards. For instance, while one commenter supported the Commission's one-year prohibition on associated persons of SBS Entities serving as special entity representatives, the commenter suggested four changes to the gross revenues component of the proposed rule: (1) Only payments by or on behalf of the SBS Entity (not by or on behalf of any affiliates or other associated persons) should be taken into account; (2) the revenue computations should be based on the representative's prior fiscal year rather than a rolling twelve-month look-back to simplify the calculations and reduce compliance costs; (3) payments to any affiliate (other than a wholly-owned subsidiary) of the representative should not be taken into account for purposes of this test; and (4) an SBS Entity should be able to rely on representations from the representative as to its gross revenues and whether payments that have been made to the representative equal or exceed the ten percent threshold.[920]

Another commenter proposed reducing the one year disqualification period for association with the SBS Entity to six months.[921] This commenter also suggested excluding from the gross revenue test: (1) Income from referrals from the gross revenue test, because referrals "can be difficult to track;" and (2) income paid by an SBS Entity on behalf of the special entity.[922]

A third commenter generally opposed the proposed rule on the basis that it was unclear, would require costly enhancements to compliance systems, and "would be particularly problematic in instances where a corporate transaction changes the identity of associated persons during the look-back year." [923] With respect to the first prong of the proposed rule, this commenter supported eliminating the one-year look back period, as it believed the costs of compliance with that provision would outweigh any benefits. Instead, the commenter argued that "independence" should be established if the representative is not an associated person of an SBS Entity at the time of the transaction.[924] With respect to the gross revenue test, the commenter argued that the term "indirect compensation" was vague, and that "determining what would comprise indirect compensation and establishing a compliance system to track that indirect compensation represents a significant and time consuming burden," the expense of which would likely be passed on to special entities.[925] The commenter therefore suggested limiting the gross revenue test to direct revenue received by the representative from the SBS Dealer—and not its affiliates.[926]

A fourth commenter objected to the compliance burdens raised by the proposed rule, as well as various implementation concerns on the grounds that both prongs of the test were "moving targets" that would substantially complicate compliance and impose additional burdens and costs on advisors and special entities.[927] The commenter recommended that the Commission eliminate the twelve-month "look-back" provision altogether, but argued that if the Commission retained this provision, it should apply only where a continuing agreement exists between the representative and the SBS Entity (such as an ongoing corporate services agreement), that the one-year period be defined as a calendar year rather than a rolling twelve-month period, and that it should only be triggered by the SBS Entity and the representative—not by any associated persons of the SBS Entity or the representative.[928] This commenter additionally urged the Commission to eliminate the gross revenue test on the grounds that it was unduly restrictive and difficult to apply. However, if the Commission retained the gross revenue test, the commenter requested that the final rule clarify how gross revenues are to be calculated.[929]

Another commenter argued that the final version of proposed Rule 15Fh–2(c) clarify that the ten percent gross revenue test would not apply to any independent representative employed by the special entity, as such a prohibition would be inappropriate.[930] The commenter also suggested that the prohibition on independent representatives who have worked for an SBS Entity within the past year should not apply if the independent representative is an employee of the special entity, who owes the special entity a fiduciary duty.[931] The commenter asserted that if an independent representative is an employee of and owes a fiduciary duty to an institutional investor organization, an SBS Entity should have no authority to assess the representative's qualifications. The commenter pointed out that, as a fiduciary, the employee's prior employment by an SBS Entity would be irrelevant—since any actual breach of fiduciary duty would be governed by the special entity's charter, state law or other applicable legal requirements, rather than the Dodd-Frank Act.[932]

iii. Response to Comments and Final Rule

After consideration of the comments, the Commission is adopting Rule 15Fh–2(c), with certain modifications. First, we moved the rule defining the "independence" of a special entity's representative from Rule 15Fh–2 to Rule 15Fh–5 in an effort to minimize confusion, and to consolidate the requirements of the qualified independent representative into Rule 15Fh–5. Specifically, the Commission is renumbering proposed Rule 15Fh–2(c) as Rule 15Fh–5(a)(1)(vii). In doing so, we have subsumed the requirement that a representative be independent of the SBS Entity under the criteria for a special entity's qualified independent representative.

Consistent with our proposal and with comments received, we continue to believe that a qualified independent representative should be independent of the SBS Entity, but need not be independent of the special entity itself.[933] We do not believe that special entities would receive any greater protection by being required to incur the cost of retaining a representative that was independent of the special entity; in fact, the special entity may be better served by someone who has an ongoing relationship with it and is more familiar with the uses of the proceeds of the swap and other needs of the special entity. Although the Dodd-Frank Act is silent concerning the question of independence from the special entity, nothing in the Dodd-Frank Act precludes the use of a qualified independent representative that is affiliated with the special entity. Accordingly, Rule 15Fh–5(a)(1) only requires that the independent representative be independent of the SBS Entity to be a qualified independent representative.

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[919] *Id.*

[920] *See* FIA/ISDA/SIFMA, *supra* note 5.

[921] *See* APPA, *supra* note 5.

[922] *Id.*

[923] *See* BlackRock, *supra* note 5.

[924] *Id.*

[925] *Id.*

[926] *Id.*

[927] *See* SIFMA (August 2011), *supra* note 5.

[928] *Id.*

[929] *Id.*

[930] *See* ABA Committees, *supra* note 5.

[931] *Id.*

[932] *Id.*

[933] *See* Proposing Release, 76 FR at 42426, *supra* note 3. *See also* APPA; Ropes & Gray, *supra* note 5; and BlackRock, *supra* note 5.

We are adopting Rule 15Fh–5(a)(1)(vii) (formerly proposed Rules 15Fh–2(c)(1) and (2)) with one modification. Proposed Rule 15Fh–2(c)(1) defined an independent representative of a special entity, in part, as "independent of the security-based swap dealer or major security-based swap participant that is the counterparty to a proposed security-based swap." Rule 15Fh–5(a)(1)(vii) as adopted eliminates the phrase "that is the counterparty to a proposed security-based swap" from the definition. As described immediately below, this change is intended to reconcile the use of the term "qualified independent representative" in Rules 15Fh–5(a)(1) and 15Fh–2(a)(2) as adopted.

Specifically, Rule 15Fh–2(a)(2) as proposed and as adopted, under which an SBS Dealer may seek to establish that it is not acting as an advisor to a special entity, refers to the definition of "qualified independent representative" as defined in Rule 15Fh–5(a).[934] However, although the relevant part of the definition of the term "independent representative of a special entity" in proposed Rule 15Fh–2(c)(1) included the phrase "that is a counterparty to a proposed security-based swap," the requirements in Rule 15Fh–2(a)(2) (as proposed and as adopted) are not limited to transactions in which the SBS Dealer is a counterparty to the special entity with respect to the security-based swap. Thus, as noted, we are eliminating the phrase "that is the counterparty to a proposed security-based swap" in Rule 15Fh–5(a)(1)(vii) as adopted to reconcile the cross reference to the term "qualified independent representative" in Rule 15Fh–2(a)(2).

This change will not alter the scope of Rule 15Fh–5(a) as adopted, because that rule is only applicable to an SBS Entity acting as counterparty to a special entity. It will, however, align the definition of qualified independent representative with the scope of Rule 15Fh–2(a), which applies to recommended transactions whether or not the SBS Dealer is a counterparty to the recommended security-based swap. As a result, there must always be someone independent of the SBS Dealer reviewing any recommended security-based swap transaction on behalf of the special entity, whether or not the SBS Dealer making the recommendation is the counterparty to the transaction. Furthermore, the elimination of the phrase "that is the counterparty to a proposed security-based swap" in the rule as adopted will harmonize the rule more closely with the parallel CFTC requirement.

Under Rule 15Fh–5(a)(1)(vii)(A) as adopted, a representative of a special entity is independent of an SBS Entity if the representative does not have a relationship with the SBS Entity, "whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative." Rule 15Fh–5(a)(1)(vii)(B) (as adopted) modifies the criteria for determining the independence of the representative that was proposed in proposed Rule 15Fh–2(c)(3) by replacing the ten percent gross revenues test with requirements for timely disclosures of all material conflicts of interest and a prohibition against referrals, recommendations or introductions by the SBS Entity within one year of the representative's representation of the special entity. Under Rule 15Fh–5(a)(1)(vii)(B) as adopted, a representative of a special entity will be deemed to be independent of an SBS Entity if three conditions are met: (1) The representative is not and, within one year of representing the special entity in connection with the security-based swap, was not an associated person of the SBS Entity; (2) the representative provides timely disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the special entity and complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest; and (3) the SBS Entity did not refer, recommend, or introduce the representative to the special entity within one year of the representative's representation of the special entity in connection with the security-based swap.

Rule 15Fh–5(a)(1)(vii)(B)(1) (formerly proposed Rule 15Fh–2(c)(2)) requires that the independent representative is not and was not an associated person of the SBS Entity "within one year of representing the special entity in connection with the security-based swap." One commenter agreed with the one-year time frame in this provision.[935] One commenter suggested that one year was not long enough and suggested a two-year look back[936] and another commenter suggested that one year was too long and suggested a six-month look back.[937] After consideration of the comments, the Commission continues to believe that an appropriate amount of time is necessary to "cool off" any association with an SBS Entity before being considered independent of the SBS Entity, and believes that a one-year period between being an associated person of an SBS Entity and functioning as an independent representative is an appropriate amount of time. We disagree with the commenter that a shorter six-month look back would be appropriate, as we believe that a one-year cooling off period provides greater assurances of independence. At the same time, we do not want to unnecessarily place lengthy restrictions on a representative's ability to work as an independent representative or unnecessarily restrict a special entity's access to qualified independent representatives. For this reason, we believe that a one year restriction strikes an appropriate balance. In addition to the comments received, we note that many market participants have established compliance policies and procedures to address a one-year look-back to comply with the CFTC rule that requires that the independent representative was not an associated person of the Swap Entity within the preceding twelve months or the independent representative complied with policies and procedures reasonably designed to manage and mitigate the conflict of being an associated person within the last twelve months.[938]

Rule 15Fh–5(a)(1)(vii)(B)(2) adds the new requirement that a representative must provide timely disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative regarding its obligations to the special entity, and the representative must comply with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest. This requirement establishes a standard that is designed to support the development of an SBS Entity's reasonable belief regarding the independence of the representative advising a special entity. One commenter recommended adopting such a requirement, asserting that the CFTC standard, including the requirement for timely disclosures has, in their "members' experiences proved sufficient to ensure the independence of special entity representatives and mitigate possible conflicts of interest, while also establishing an objective standard that special entities can apply in practice."[939] In addition, harmonization with the parallel CFTC rule will result in efficiencies for SBS Entities that have already established infrastructure to comply with the CFTC rule.

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[934] Specifically, Rule 15Fh–2(a)(2) requires, among other things, a written representation by the special entity that it "will rely on advice from a qualified independent representative *as defined in [Rule] 15Fh–5(a)*" (emphasis added).

[935] *See* FIA/ISDA/SIFMA, *supra* note 5.

[936] *See* CFA, *supra* note 5.

[937] *See* APPA, *supra* note 5.

[938] *See* CFTC Adopting Release, 77 FR at 9795, *supra* note 21.

In the Commission's view, to be "timely," a representative's disclosures must allow the special entity sufficient opportunity to assess the likelihood or magnitude of a conflict of interest prior to entering into the security-based swap.

To determine which conflicts of interest disclosures are required, an SBS Entity generally would need a reasonable basis to believe that the representative reviewed its relationships with the SBS Entity and its affiliates, including lines of business in which the representative solicits business. Additionally, where applicable, the SBS Entity generally would also need a reasonable basis to believe the representative reviewed the relationships of its principals and employees, who could affect the judgment or decision making of the representative on behalf of the special entity.

Lastly, Rule 15Fh–5(a)(1)(vii)(B)(3) replaces the proposed "gross revenues" test with a standard under which a representative will not be deemed independent if the SBS Entity refers, recommends, or introduces the representative to the special entity within one year of the representative's representation of the special entity in connection with the security-based swap. The change is intended to provide a simpler standard for achieving the policy goal that a special entity's choice of representative and the advice the representative provides should be made without any influence or input from the SBS Entity.

In making this modification to the rule as adopted, the Commission seeks to address commenters' concerns about cost, clarity, and practicality.[940] Commenters had expressed concerns regarding the gross revenues test and an SBS Entity's ability to accurately track the revenues.[941] One commenter suggested eliminating the gross revenues standard altogether.[942] After consideration of the comments, the Commission believes that the disclosures provided and the prohibition against referrals, recommendations or introductions adequately addresses concerns regarding independence more simply and directly than the proposed "gross revenues" test.[943] Furthermore, this prohibition harmonizes the Commission's standards for the independence of the representative with those of the CFTC.

6. Qualifications of the Independent Representative

Proposed Rules 15Fh–5(a)(1)(i)–(vii) would list the required qualifications of a special entity's independent representative. The qualifications would be that the independent representative: (1) Has sufficient knowledge to evaluate a security-based swap and its risks; (2) is not subject to statutory disqualification; (3) will undertake a duty to act in the best interests of the special entity; (4) makes appropriate and timely disclosures to the special entity of material information concerning the security-based swap; (5) will provide written representations to the special entity regarding fair pricing and the appropriateness of the security-based swap; (6) (in the case of employee benefit plans subject to ERISA) is a fiduciary as defined in ERISA; and (7) is subject to the pay to play prohibitions of the Commission, the CFTC, or an SRO that is subject to the jurisdiction of the Commission or the CFTC. Each of these proposed qualifications is discussed in turn below.

As discussed above in Section II.H.5.a.iii.B and more fully below, the rules as adopted will distinguish between transactions with special entities subject to ERISA, and transactions with special entities other than those subject to ERISA. Specifically, Rule 15Fh–5(a)(1) as adopted addresses the qualifications for the independent representatives of special entities other than those subject to regulation under ERISA, and Rule 15Fh–5(a)(2) as adopted addresses the qualifications for independent representatives of special entities subject to regulation under ERISA.

a. Written or Other Representations Regarding Qualifications

i. Proposal

In the Proposing Release, the Commission also requested comment regarding whether independent representatives must furnish written representations about their qualifications, or whether the rules should permit other means of establishing that a special entity's independent representative possessed the requisite qualifications.

ii. Comments on the Proposal

The Commission received three comment letters on this point, all in favor of a written representation requirement.[944] Although one such commenter agreed that written representations should be sufficient to ensure that a qualified independent swap advisor had been hired, the commenter proposed that the written representations include a verification that the external swap advisor had registered with and met professional standards set by the appropriate regulatory body overseeing swap advisors.[945] According to the commenter, this would provide for independent verification that was not associated with the SBS Dealer or the special entity, thereby minimizing any potential conflict of interests.[946]

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[939] *See* SIFMA (August 2015), *supra* note 5.

[940] *See* SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5; and SIFMA (August 2015), *supra* note 5.

[941] *See* SIFMA (August 2011), *supra* note 5 (expressing concerns about calculating a rolling twelve months of revenues and arguing that the ten percent threshold would create a revenue ceiling that is unduly restrictive and difficult to apply (*e.g.*, a representative to multiple collective investment vehicles would be required to consider each of its multiple distributors for each collective investment vehicle as a source of indirect revenue)); FIA/ISDA/SIFMA, *supra* note 5 (arguing for clarification that (1) payments to or from affiliates of the SBS Entity or representative would not be taken into account; (2) revenue computations should be determined as of the end of the prior fiscal year; and (3) the SBS Entity may rely on representations from the representative as to its gross revenues and whether payments equal or exceed the ten percent threshold); APPA, *supra* note 5 (suggesting (1) elimination of income from referrals from the gross revenue test because referrals are difficult to track; and (2) gross revenues test should not take into account income paid by an SBS Entity on behalf of the special entity); BlackRock, *supra* note 5 (expressing concerns regarding what would comprise "indirect compensation" and the compliance systems to track it and arguing that revenue received from affiliates of the SBS Dealer should not be considered); and SIFMA (August 2015), *supra* note 5 (arguing for the replacement of the gross revenues test with the CFTC standard).

[942] *See* SIFMA (August 2011), *supra* note 5; and SIFMA (August 2015), *supra* note 5.

[943] Although the independence safe harbor under Rule 15Fh–5(a)(vii)(B) does not include a gross revenues test, SBS Entities should consider whether the sources of revenues of a representative create a conflict of interest that must be disclosed pursuant to Rule 15Fh–5(a)(vii)(B)(2) or 15Fh–5(b) or otherwise impede the independence of the representative. Depending on the facts and circumstances, failure to disclose material conflicts of interest when there is a recommendation by a broker-dealer can be a violation of the antifraud rules. *See, e.g., Chasins,* 438 F.2d at 1172.

[944] *See* NAIPFA, *supra* note 5; GFOA, *supra* note 5; APPA, *supra* note 5.

[945] *See* GFOA, *supra* note 5.

Another commenter suggested that, in the case of an internal representative, written representations should be obtained either from the representative or from the special entity, or a combination of the two, depending on the circumstances.[947] In the case of third-party representatives, the commenter suggested that the third-party representative provide the statement either directly to the SBS Entity or to the special entity acknowledging that the statement would be relied on by SBS Entities for purposes of the business conduct rules.[948]

iii. Response to Comments and Final Rule

After considering the comments, the Commission has determined not to mandate a manner of compliance with the requirements of Rule 15Fh–5(a). As discussed above, the obligation is on the SBS Entity to have a reasonable basis for believing that an independent representative has the necessary qualifications. An SBS Entity may use various means, such as reliance on representations from the special entity or its representative or due diligence, to form its reasonable basis to believe the special entity's independent representative meets the qualifications outlined in Rule 15Fh–5(a).

When an SBS Entity is relying on representations from a special entity or its representative to satisfy the requirements of the rule, the requirements of Rule 15Fh–1(b) will apply.[949] Consistent with our approach to representations used to make institutional suitability determinations, we believe that parties should be able to make representations regarding the knowledge and qualifications of the independent representative on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or broadly in terms of all potential transactions between the parties. However, where there is an indication that the independent representative is not capable of independently evaluating investment risks, or does not intend to exercise independent judgment regarding all of an SBS Entity's recommendations, the SBS Entity necessarily will have to be more specific in its approach. For instance, in some cases, an SBS Entity may be unable to determine that an independent representative is capable of independently evaluating investment risks with respect to any security-based swap. In other cases, the SBS Entity may determine that the independent representative is generally capable of evaluating investment risks with respect to some categories or types of security-based swaps, but that the independent representative may not be able to understand a particular type of security-based swap or its risk.

b. Sufficient Knowledge To Evaluate Transaction and Risks

i. Proposed Rule

Proposed Rule 15Fh–5(a)(1) would require an SBS Entity to have a reasonable basis to believe that the independent representative has sufficient knowledge to evaluate the security-based transaction and related risks.

ii. Comments on the Proposed Rule

The Proposing Release solicited comment regarding what circumstances, if any, would give rise to a presumption of qualification for certain independent representatives other than ERISA fiduciaries.

Presumptive Qualification

Two commenters supported a finding of presumptive qualification for sophisticated, professional advisers, such as banks, Commission-registered investment advisers, registered municipal advisors, or other similarly qualified professionals.[950] The commenter stated its view that applicable federal and/or state regulations governing these entities already impose requirements that ensure a minimum qualification level, and any additional evaluation of such representatives' qualifications would add little or no value to a special entity's representative selection process.[951]

Other commenters supported the presumption of qualification for in-house representatives of a special entity, since those representatives should presumably act in the best interests of the special entity by virtue of their employment with the special entity.[952] More specifically, one commenter supported this presumption on the grounds that the representative had been hired by the special entity to perform a hedging and risk control function, that he or she would be subject to direct control by his or her employer, and that he or she would be subject to regular review.[953] Another commenter supported this presumption so long as the in-house representative met established requirements for qualification, testing and continuing education.[954]

Similarly, one commenter supported the presumption of qualification for independent representatives where a governmental entity had verified the qualifications of its independent representative employee through the hiring process.[955]

Registration of Representative as Municipal Advisor or Investment Adviser

In the Proposing Release, the Commission asked whether to require that an independent representative be registered as a municipal advisor or an investment adviser or otherwise subject to regulation, such as banking regulation.[956] Three commenters expressed some support for the proposed registration requirement for independent representatives,[957] while one commenter opposed it.[958]

The first commenter supporting the registration requirement suggested that the written representations regarding a representative's qualifications include a verification that the external swap advisor had registered with and met professional standards set by the appropriate regulatory body overseeing swap advisors.[959]

Another commenter supported the requirement that independent representatives be registered with the Commission as municipal advisors or investment advisers, or that they otherwise be subject to regulation, such as banking regulations, under which the independent representative would be bound by a fiduciary duty of loyalty and care at all times.[960]

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[946] *Id.*

[947] *See* APPA, *supra* note 5.

[948] *Id. See also* SIFMA (August 2015), *supra* note 5 (asserting that an SBS Entity should be deemed to have formed a reasonable basis to believe that a special entity has a qualified independent representative by relying on written representations that the representative is either an ERISA fiduciary, or that the representative satisfies the criteria for a qualified independent representative).

[949] *See* discussion in Section II.D, *supra.*

[950] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[951] *See* SIFMA (August 2011), *supra* note 5.

[952] *See* ABA Committees, *supra* note 5; NAIPFA, *supra* note 5; CalPERS, *supra* note 5; Ropes & Gray, *supra* note 5; APPA, *supra* note 5; GFOA, *supra* note 5.

[953] *See* APPA, *supra* note 5.

[954] *See* NAIPFA, *supra* note 5. NAIPFA did not support a presumption of qualification for "a sophisticated, professional adviser such as a bank, Commission-registered investment adviser, insurance company or other qualifying QPAM or INHAM for Special Entities subject to ERISA, a registered municipal advisor, or a similar qualified professional."

[955] *See* GFOA, *supra* note 5.

[956] *See* Proposing Release, 76 FR at 42429, *supra* note 3. Such registration would subject independent representatives to rules such as MSRB rules (for example, Notice 2011–04 Pay to Play Rules for Municipal Advisors) or other regulation (for example, 17 CFR 275.206(4)–5). *See also* Proposing Release, 76 FR at 42431 n.245–247, *supra* note 3.

[957] *See* NAIPFA, *supra* note 5; GFOA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[958] *See* APPA, *supra* note 5.

[959] *See* GFOA, *supra* note 5.

The third commenter requested that the Commission establish a safe harbor permitting an SBS Entity to conclude that the special entity's representative was "qualified" (but not necessarily "independent") if the representative was a registered municipal advisor or an SEC-registered investment adviser that provides investment advice with respect to security-based swaps (or a foreign entity having an equivalent status abroad).[961]

As noted above, one commenter opposed requiring employees of a special entity to register in any capacity, and suggested that any requirement to register third-party representatives should first be issued in the form of a notice of proposed rulemaking.[962]

Proficiency Examination

In the Proposing Release, the Commission requested comment regarding whether a proficiency examination should be developed to assess the qualifications of independent representatives. Four commenters supported the development and usage of a proficiency examination,[963] while one commenter opposed any proficiency examination for in-house representatives.[964]

One commenter, advocating for a proficiency examination, argued that such testing should be mandatory for both in-house and third-party representatives.[965] Another commenter suggested that the proficiency examination could be developed by the Commission, an SRO (*e.g.,* FINRA), or another recognized testing organization.[966] Furthermore, after passing the examination, this commenter suggested that an independent representative be required to complete periodic continuing education.[967]

On the other hand, one commenter opposed any proficiency examination for in-house representatives, and argued that a proficiency exam for third-party representatives might provide a false sense of expertise.[968] This commenter also expressed concern that an examination requirement might, directly or indirectly, impose additional costs or burdens on special entities or SBS Entities.[969]

Periodic Re-Evaluation of Qualifications

In the Proposing Release, the Commission asked whether an SBS Entity should be required to reevaluate (or, as applicable, require a new written representation regarding) the qualifications of the independent representative on a periodic basis.

The Commission received three comment letters in response to the request for comment.[970] The first commenter viewed the reevaluation of a representative's qualifications as unnecessary if independent representatives were subject to continuing education and periodic testing requirements.[971] Another commenter suggested that the Commission permit the representations regarding a representative's qualifications to be set forth in a letter that could be relied on for the duration of a swap master agreement.[972] However, this commenter acknowledged a value in requiring periodic re-certification for third-party representatives, and recommended that such re-certification occur every two years.[973] The third commenter was concerned that trade-by-trade documentation of the independent representative criteria could reduce the speed of trade execution for special entities and add compliance burdens to each transaction.[974] This commenter requested that the Commission clarify that an SBS Dealer may meet its burden of confirming the qualifications of an independent representative through appropriate representations provided by the special entity no more frequently than annually.[975]

iii. Response to Comments and Final Rule

Upon consideration of the comments, the Commission is adopting Rule 15Fh–5(a)(1)(i) (formerly proposed Rule 15Fh–5(a)(1)), as proposed.

Rule 15Fh–5(a)(1)(i) as adopted requires that SBS Entities have a reasonable basis to believe that the independent representative has sufficient knowledge to evaluate the transaction and risks. The independent representative may be required to register by the statutes and rules of another regulatory regime, such as municipal advisor or investment adviser, and nothing in the business conduct standards modifies or otherwise alters those registration requirements. Whether or not an independent representative is otherwise registered under a different regulatory regime may inform the SBS Entity's view of the independent representative's knowledge and qualifications, but would not automatically satisfy the qualification requirements of the independent representative. For example, an independent representative registered as an investment adviser may be very knowledgeable with respect to a variety of asset classes that do not include security-based swaps.

While some commenters supported the development of a proficiency examination, we are neither developing nor requiring that a proficiency examination be developed to assess the qualifications of independent representatives.[976] As noted above, an SBS Entity may reasonably rely on written representations about the qualifications of the independent representative to satisfy this obligation. In this regard, the Commission believes that the framework of Rule 15Fh–5(a)(1) provides an appropriate criteria for assessing the qualifications of special entity representatives.[977]

As discussed below, we are separately providing in new Rule 15Fh–5(a)(2) that the qualified independent representative requirement will be satisfied if a special entity that is subject to regulation under ERISA has a representative that is a fiduciary as defined in Section 3 of ERISA. We recognize that Congress has established a comprehensive federal regulatory framework that applies to plans subject to regulation under ERISA.[978] Such recognition of the federal regulatory framework for ERISA plans maintains statutory protections for ERISA plans, while addressing the potential conflict, recognized by commenters, between the

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[960] *See* NAIPFA, *supra* note 5.

[961] *See* FIA/ISDA/SIFMA, *supra* note 5.

[962] *See* APPA, *supra* note 5.

[963] *See* CFA, *supra* note 5; CalPERS (August 2011), *supra* note 5; GFOA, *supra* note 5; NAIPFA, *supra* note 5.

[964] *See* APPA, *supra* note 5.

[965] *See* NAIPFA, *supra* note 5.

[966] *See* CalPERS (August 2011), *supra* note 5.

[967] *Id.*

[968] *See* APPA, *supra* note 5.

[969] *Id.*

[970] *See* NAIPFA, *supra* note 5; APPA, *supra* note 5; Ropes & Gray, *supra* note 5.

[971] *See* NAIPFA, *supra* note 5.

[972] *See* APPA, *supra* note 5.

[973] *Id.*

[974] *See* Ropes & Gray, *supra* note 5.

[975] *Id.*

[976] *See* CFA, *supra* note 5; CalPERS (August 2011), *supra* note 5; GFOA, *supra* note 5; NAIPFA, *supra* note 5.

[977] However, as noted above in Section II.H.5., *supra*, to the extent a proficiency examination or certification process develops in the future, such examination or certification may inform an SBS Entity's reasonable basis to believe the qualifications of the independent representative.

[978] *See* 29 U.S.C. 1104 and 1106.

ERISA rules and business conduct standards adopted today.[979]

Commenters have suggested various time frames in which an independent representative's qualifications should be confirmed or recertified.[980] Whether or not an independent representative's qualifications should be periodically re-evaluated will likely be dependent on whether it is reasonable for the SBS Entity to continue to rely on the representations regarding the independent representative's qualifications. The Commission recognizes the potential benefit of requiring periodic re-evaluation, but is also mindful of the costs of doing so. The Commission has determined that it is appropriate to allow the SBS Entity to determine the necessity for a re-evaluation based on the reasonableness of its reliance on the representations it receives from the special entity regarding the qualifications of the independent representatives, which will provide the SBS Entities and the special entities with flexibility to address their particular facts and circumstances while still affording the special entities the protections of the rules.[981]

c. No Statutory Disqualification

i. Proposed Rule

Proposed Rule 15Fh–5(a)(2) would require an SBS Entity to have a reasonable basis to believe that an independent representative is not subject to a statutory disqualification. Although Exchange Act Section 15F(h) does not define "subject to a statutory disqualification," the term has an established meaning under Section 3(a)(39) of the Exchange Act,[982] which defines circumstances that would subject a person to a statutory disqualification with respect to membership or participation in, or association with a member of, an SRO. While Section 3(a)(39) would not literally apply here, the Commission proposed to define "subject to a statutory disqualification" for purposes of proposed Rule 15Fh–5 by reference to Section 3(a)(39) of the Exchange Act.

ii. Comments on the Proposed Rule

In the Proposing Release, the Commission solicited comment regarding whether it should require an SBS Entity to check publicly available databases, such as FINRA's BrokerCheck and the Commission's Investment Adviser Public Disclosure program, to determine whether an independent representative was subject to a statutory disqualification.

The Commission received two comment letters on this issue. To minimize the degree of diligence imposed on SBS Dealers, one commenter suggested requiring third-party representatives to affirm that they are not subject to statutory disqualification, are not under investigation, and are not listed on the publicly available databases described above.[983]

After the adoption of the CFTC's final rules, the Commission received one comment letter addressing the definition of "statutory disqualification in the Proposing Release."[984] This commenter stated that, although the statutory disqualification standards under the Exchange Act and the CEA differ somewhat, both cover comparable types of disqualifying events.[985] Therefore, requiring a dual registrant to apply different standards for statutory disqualification "would impose substantial and duplicative diligence documentation, without material countervailing benefits."[986] To avoid this conflict, the commenter suggested including language to accommodate dually registered SBS Entities by establishing a safe harbor where they are deemed to have a reasonable basis to believe that a person is not subject to statutory disqualification under the Exchange Act if the dually registered SBS Entity has a reasonable basis to believe that the person is not subject to statutory disqualification under the CEA.[987] According to the commenter, this would allow dually registered SBS Entities to determine whether a special entity's representative is subject to statutory disqualification based on the information it obtained to ensure compliance with the parallel CFTC business conduct rule.[988]

iii. Response to Comments and Final Rule

The Commission is adopting proposed Rule 15Fh–5(a)(2), renumbered as Rule 15Fh–5(a)(1)(ii), as proposed, with one modification. The Commission is incorporating the definition of "statutory disqualification" under Section 3(a)(39)(A)–(F) of the Exchange Act, whereas the proposed rule incorporated the definition under Section 3(a)(39) of the Exchange Act.

Exchange Act Section 15F(h) does not define "subject to a statutory disqualification," however Exchange Act Section 3(a)(39) defines the term "statutory disqualification." As discussed in the SBS Entity Registration Adopting Release, the definition in Exchange Act Section 3(a)(39) specifically relates to persons associated with an SRO. In recognition of the fact that an independent representative of a special entity may not be associated with an SRO, we have modified the text of proposed Rule 15Fh–2(f) to reference Sections 3(a)(39)(A)–(F) of the Securities Exchange Act of 1934. This updated cross-reference incorporates the underlying issues that give rise to statutory disqualification without reference to SRO membership.[989]

In defining the phrase "subject to statutory disqualification," the Commission declines to reference any parallel provisions of the CEA.[990] The CFTC defines "statutory disqualification" under relevant sections of the CEA, without reference to parallel provisions of the Exchange Act. Therefore the inclusion of references to the CEA might lead to greater confusion and less certainty among market participants regarding what persons would be subject to statutory disqualification.

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[979] *See* Section I.D. *supra; see also* CFTC Adopting Release, *supra* note 21.

[980] *See* Ropes & Gray, *supra* note 5 (no more frequently than annually); and APPA, *supra* note 5 (recertified every two years).

[981] As discussed above in Section II.D, the question of whether reliance on representations would satisfy an SBS Entity's obligations under our business conduct rules will depend on the facts and circumstances of the particular matter. An SBS Entity can rely on a counterparty's written representations unless the SBS Entity has information that would cause a reasonable person to question the accuracy of the representation. Similar to our approach to the reasonableness of reliance of representations with respect to institutional suitability in Section II.G.4, information that might be relevant to this determination includes whether the independent representative has previously advised with respect to this type of security-based swap or been involved in the type of trading strategy, and whether the independent representative has a basic understanding of what makes the security-based swap distinguishable from a less complex alternative. If the SBS Entity knows that the security-based swap or trading strategy represents a significant change from prior security-based swaps that the independent representative has evaluated or knows that the representative lacks a basic understanding of what distinguishes the security-based swap from a less complex alternative, the SBS Entity generally should consider whether it can reasonably rely on the representations regarding the qualifications of the independent representative.

[982] 15 U.S.C. 78c(a)(39).

[983] *See* APPA, *supra* note 5.

[984] *See* SIFMA (August 2015), *supra* note 5.

[985] *Id.*

[986] *Id.*

[987] *Id.*

[988] *Id.*

[989] *See* Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48964 (Aug. 14, 2015) ("Registration Adopting Release").

[990] In determining whether an SBS Entity has a reasonable basis to believe an independent representative is not subject to a statutory disqualification, the SBS Entity may reasonably rely on representations regarding the absence of a statutory disqualification. *See* Sections II.D. and II.H.6.a above.

The Commission declines to adopt a commenter's suggestion to require third-party representatives to provide specific affirmations that they are not subject to statutory disqualifications, are not under investigation, and are not listed on publicly available databases as subject to a statutory disqualification. We do not believe that it is necessary or appropriate to prescribe in Rule 15Fh–5(a)(1)(ii) how an SBS Entity must form its reasonable basis to believe that the independent representative is not subject to a statutory disqualification; rather, the rule provides SBS Entities the flexibility to determine how best to meet their obligation. The SBS Entity may reasonably rely on representations regarding the qualifications of the independent representative to form its reasonable basis, but it is not required to do so. Nor is it required to obtain any specific representations or affirmations.

d. Undertakes a Duty To Act in the Best Interests of the Special Entity

i. Proposed Rule

Proposed Rule 15Fh–5(a)(3) would require an SBS Entity to have a reasonable basis to believe that the independent representative would undertake a duty to act in the best interests of the special entity.

ii. Comments on the Proposed Rule

The Commission requested comment regarding what circumstances, if any, would give rise to a presumption that an independent representative was acting in the best interests of the special entity. The Commission received seven comment letters supporting the presumption that certain representatives would act in the best interests of the special entity by virtue of their employment with the special entity or their status as fiduciaries.[991] According to these commenters, in-house representatives of a special entity should presumably act in the best interests of their special entity employer, particularly where their performance would be subject to the special entity's review and evaluation.[992]

iii. Response to Comments and Final Rule

As discussed in Section I.D., *supra*, the Commission has modified Rule 15Fh–5 to address the intersection of Dodd-Frank and ERISA regulation by distinguishing between non-ERISA special entities and ERISA special entities. With respect to non-ERISA special entities, under Rule 15Fh–5(a)(1), an SBS Entity must have a reasonable basis for believing that a non-ERISA special entity counterparty has a qualified independent representative that, among other things, undertakes a duty to act in the "best interests" of the special entity.[993] With respect to ERISA special entities, under Rule 15Fh–5(b)(2), the SBS Entity must have a reasonable basis to believe a special entity counterparty that is "subject to" regulation under ERISA has a representative that is a "fiduciary" as defined in Section 3 of ERISA. This bifurcated treatment of ERISA and non-ERISA special entities under Rule 15Fh–5(a) addresses the commenter's recommendation that the business conduct rules recognize the comprehensive federal regulatory framework that applies to plans that are subject to regulation under ERISA, as well as creates efficiencies for special entities that have already conformed their relationships with their representatives to satisfy the CFTC's qualification criteria.[994]

The Commission is adopting proposed Rule 15Fh–5(a)(3), renumbered as Rule 15Fh–5(a)(1)(iii), as proposed. The Commission agrees with commenters that an SBS Entity may rely on information about legal arrangements between the special entity and its representative to establish that the representative is obligated to act in the best interests of the special entity, including by contract, employment agreement, or other requirements under state or federal law. In addition, Rule 15Fh–5(b) provides safe harbors for forming a reasonable basis regarding the qualifications of the independent representative.[995] Specifically, part of the safe harbor is satisfied if the independent representative provides a written representation that it is legally obligated to comply with the applicable requirements in Rule 15Fh–5(a)(1) that describe the qualifications of the independent representative—including that it undertakes to act in the best interests of the special entity—by agreement, condition of employment, law, rule, or other enforceable duty. Given the relief provided by the safe harbor, at this time, the Commission does not believe a presumption is necessary regarding the reasonable belief of the SBS Entity relating to the undertaking of the independent representative to act in the best interests of the special entity.

e. Makes Appropriate and Timely Disclosures to Special Entity

i. Proposed Rule

Proposed Rule 15Fh–5(a)(4) would require an SBS Entity to have a reasonable basis to believe that the special entity's independent representative would make "appropriate and timely" disclosures to the special entity of material information concerning the security-based swap.

ii. Comments on the Proposed Rule

The Proposing Release solicited comment regarding whether to impose specific requirements with respect to the content of the disclosures in proposed Rule 15Fh–5(a)(4). The Commission received six letters addressing this provision of the proposed rule. Two commenters supported the use of specific disclosures to satisfy this requirement.[996] In contrast, two commenters argued that the Commission should not require specific content disclosures.[997] One commenter appeared to argue that the standard of the proposed rule was too low,[998] and two commenters cautioned against reading this portion of the proposed rule as requiring the disclosure of information before the execution of each trade.[999]

A commenter recommended that the final rules expressly state that the appropriate and timely disclosure requirement would be satisfied if the SBS Entity received a written representation affirming that the representative is "obligated by law and/or agreement or undertaking to provide appropriate and timely disclosures to the special entity."[1000] However, this commenter additionally believed that, because this provision of the proposed rule could be read to mandate pre-execution disclosure on a transaction-by-transaction basis, it could cause delays in the execution of security-based swaps, interfere with special entities' ability to hedge positions and portfolio risks, and deprive them of trading opportunities.[1001] Another commenter requested that the Commission clarify that proposed Rule 15Fh–5(a)(4) would not require the disclosure of information before a trade is executed.[1002]

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[991] *See* ABA Committees, *supra* note 5; NAIPFA, *supra* note 5; CalPERS, *supra* note 5; Ropes & Gray, *supra* note 5; APPA, *supra* note 5; GFOA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[992] *See* ABA Committees, *supra* note 5; NAIPFA, *supra* note 5; CalPERS, *supra* note 5; Ropes & Gray, *supra* note 5; APPA, *supra* note 5; GFOA, *supra* note 5.

[993] Rule 15Fh–5(a)(1)(iii).

[994] *See* SIFMA (August 2015), *supra* note 5.

[995] *See* Section II.H.6.g. below for a more detailed discussion of the safe harbor.

[996] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[997] *See* APPA, *supra* note 5.

[998] *See* NAIPFA, *supra* note 5.

[999] *See* BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[1000] *See* SIFMA (August 2011), *supra* note 5.

A third commenter urged the Commission not to impose specific requirements regarding the content of the disclosures.[1003] According to this commenter, there are too many types of swaps and circumstances to allow for a uniform set of mandated disclosures.[1004] After the adoption of the CFTC's final rules, a commenter argued against the specific requirement that the qualified independent representative disclose "material information concerning the security-based swap." [1005] The commenter requested that the Commission instead make the requirement a general requirement to make appropriate and timely disclosures to the special entity to harmonize this provision with the parallel CFTC requirement, "which would reduce costs for special entities since most of them have already conformed their relationships with their representatives to satisfy the CFTC's qualification criteria." [1006]

iii. Response to Comments and Final Rule

As noted above, the SBS Entity may reasonably rely on representations regarding the independent representative making appropriate and timely disclosures to the special entity to form its reasonable basis to believe that the independent representative will comply with Rule 15Fh–5(a)(1)(iv). As with Rule 15Fh–5(a)(1)(iii), an SBS Entity may rely on appropriate legal arrangements between a special entity and its representative to form a reasonable basis to believe the representative will make appropriate and timely disclosures to the special entity of material information regarding the security-based swap—such as an existing contract or employment agreement.

In response to the comments arguing that pre-trade disclosure should not be required, we believe the necessity of pre-trade disclosure will depend on the facts and circumstances of the particular security-based swap in the context of the special entity and independent representative. The SBS Entity is required to have a reasonable basis to believe the independent representative will provide the appropriate and timely disclosures. To the extent that any disclosures from the independent representative are necessary for the special entity to make an investment decision with respect to the security-based swap, the disclosure would not be timely if it was given after the investment decision was made. Similarly, the CFTC rule also requires that the Swap Entity have a reasonable basis to believe that the independent representative will make "appropriate and timely" disclosures. Although the language of the Commission's rule narrows the requirement found in the parallel CFTC rule to appropriate and timely disclosures of "material information concerning the security-based swap," the timing requirement is the same.[1007]

f. Pricing and Appropriateness

i. Proposed Rule

Proposed Rule 15Fh–5(a)(5) would require an SBS Entity to form a reasonable basis to believe that the special entity's independent representative would provide written representations to the special entity regarding fair pricing and the appropriateness of the security-based swap.

ii. Comments on the Proposed Rule

Four commenters addressed this proposed rule. Two commenters supported the Commission's proposal that it "should be sufficient if the representation states that the representative is obligated, by law and/or contract, to review pricing and appropriateness with respect to any swap transaction in which the representative serves as such with respect to the plan." [1008] Both commenters urged the Commission to incorporate this approach into the adopted rules.

The third commenter suggested that an independent representative should be required to disclose the basis on which it determined that a particular transaction was fairly priced, and that the underlying documentation should be sufficiently detailed to enable a third party to evaluate the representative's conclusion.[1009]

After the adoption of the CFTC's business conduct rules, the fourth commenter urged the Commission to harmonize with the CFTC and require that the qualified independent representative "evaluate[ ], consistent with any guidelines provided by the special entity, regarding fair pricing and the appropriateness of the security-based swap." [1010] The commenter asserted that this harmonization would reduce compliance costs for special entities that have already conformed their relationships with their representatives to satisfy the CFTC's qualification criteria.[1011]

iii. Response to Comments and Final Rule

Upon consideration of the comments, the Commission is modifying proposed Rule 15Fh–5(a)(5), renumbered as Rule 15Fh–5(a)(1)(v). The Commission agrees with the commenter's suggestion that the Commission should harmonize with the language of the CFTC's parallel provision, which requires an SBS Entity to form a reasonable basis that the special entity's independent representative will "evaluate" fair pricing and the appropriateness of the security-based swap, "consistent with any guidelines provided by the special entity." In the Commission's view, requiring an SBS Entity to form a reasonable basis to believe that an independent representative will evaluate, consistent with any guidelines provided by the special entity, fair pricing and the appropriateness of the security-based swap will achieve the purpose of the proposed rule to ensure the special entity receives advice specifically with respect to pricing and whether or not to enter into the security-based swap. The rule will also provide the special entity the flexibility to provide parameters to its independent representative regarding the pricing and appropriateness of its security-based swap. The Commission therefore agrees with the commenter's suggestion that the special entity's guidelines, to the extent a special entity provides them, should establish the criteria for assessing the fair pricing and appropriateness of a security-based swap. In addition, this change will harmonize the rule with the parallel CFTC rule, thus creating efficiencies for entities that have already established infrastructure to comply with the CFTC standard. In the absence of any guidelines provided by the special entity, Rule 15Fh–5(a)(1)(v) requires the SBS Entity to form a reasonable basis to believe that the independent representative will evaluate the fair pricing and appropriateness of the security-based swap.

[1001] *Id.*

[1002] *See* BlackRock, *supra* note 5.

[1003] *See* APPA, *supra* note 5.

[1004] *Id.*

[1005] *See* SIFMA (August 2015), *supra* note 5.

[1006] *Id.*

[1007] *See* Section II.H.5., *supra.*

[1008] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[1009] *See* CFA, *supra* note 5.

[1010] *See* SIFMA (August 2015), *supra* note 5.

[1011] *Id.*

An SBS Entity also could form a reasonable basis for its determination by relying on a written representation that the independent representative will document the basis for its conclusion that the transaction was fairly priced and appropriate in accordance with any guidelines provided by the plan, and that the independent representative or the special entity will maintain that documentation in its records for an appropriate period of time, and make such records available to the special entity upon request.[1012] In response to commenters' concerns, the Commission clarifies that this provision does not necessarily require that a representative provide the special entity transaction-by-transaction documentation with respect to fair pricing and appropriateness of each security-based swap. For example, where the representative is given trading authority, the representative could consider undertaking in its agreement with the special entity to ensure that the representative will evaluate the pricing and appropriateness of each swap consistent with any guidelines provided by the Special Entity prior to entering into the swap. In such a situation, the independent representative could prepare and maintain adequate documentation of its evaluation of pricing and appropriateness to enable both the representative and the special entity to confirm compliance with any such agreement.

g. Subject to "Pay to Play" Prohibitions

i. Proposed Rule

Proposed Rule 15Fh–5(a)(7) would require an SBS Entity to have a reasonable basis to believe that a special entity's independent representative is subject to rules of the Commission, the CFTC, or an SRO subject to the jurisdiction of the Commission or the CFTC that prohibit it from engaging in specified activities if certain political contributions have been made, unless the independent representative is an employee of the special entity.

While not addressed in the Dodd-Frank Act, the Commission proposed to include this "pay-to-play" provision among the qualifications for independent representatives.[1013] As discussed more fully in Section II.H.10, *infra*, pay-to-play practices in connection with security-based swap transactions could result in significant harm to special entities—particularly where, as here, the independent representative is intended to act in the best interests of special entities.[1014] The pay-to-play provisions of the proposed rules were intended to deter independent representatives from participating, even indirectly, in such practices.

ii. Comments on the Proposed Rule

The Commission received one comment letter addressing the inclusion of a pay-to-play restriction among the qualifications for independent representatives. This commenter supported the exception to the pay-to-play restrictions for advisors who are employees of the special entity.[1015]

iii. Response to Comment and Final Rule

The Commission is adopting proposed Rule 15Fh–5(a)(7), renumbered as Rule 15Fh–5(a)(1)(vi), as proposed. Accordingly, an SBS Entity must have a reasonable basis for believing that the independent representative is subject to rules of the Commission, the CFTC or an SRO subject to the jurisdiction of the Commission or the CFTC that prohibit it from engaging in specified activities if certain political contributions have been made, unless the independent representative is an employee of the special entity.[1016] As stated in the Proposing Release, the Commission continues to believe that an independent representative in these circumstances would likely be either a municipal advisor or an investment adviser that is already subject to the MSRB's or the Commission's pay-to-play prohibitions. The Commission does not, however, intend to prohibit other qualified persons from acting as independent representatives, so long as those persons are similarly subject to pay-to-play restrictions. The Commission believes that Rule 15Fh–5(a)(1)(vi) will sufficiently deter SBS Entities from participating, even indirectly, in such unlawful practices.

h. ERISA Fiduciary

i. Proposed Rule

Proposed Rule 15Fh–5(a)(6) would require an SBS Entity to have a reasonable basis to believe that, in the case of a special entity that is an employee benefit plan subject to ERISA, the independent representative was a "fiduciary" as defined in section 3(21) of that Act (29 U.S.C. 1002).[1017] The proposed rule was not intended to limit, restrict, or otherwise affect the fiduciary's duties and obligations under ERISA.[1018]

The Proposing Release solicited feedback regarding any specific requirements that should be imposed on SBS Entities with respect to this obligation, as well as what other independent representative qualifications might be deemed satisfied if an independent representative of an employee benefit plan subject to ERISA, is a fiduciary as defined in section 3 of ERISA.

ii. Comments on the Proposed Rule

The Commission received six comment letters advocating for a presumption of qualification for ERISA plan fiduciaries, since ERISA already imposes fiduciary duties upon the person who decides whether to enter into a security-based swap on behalf of an ERISA plan, and imposes on this person a statutory duty to act in the best interests of the plan and its participants, thereby prohibiting certain self-dealing transactions.[1019] According to these commenters, the Commission's proposed standards would be unnecessary, redundant, would overlap with ERISA's standards, and would only serve to increase the administrative burden and cost on SBS Entities without any corresponding benefit.[1020]

To address the potential conflict with ERISA standards, one commenter suggested that the Commission's definition of "independent representative" should be inapplicable to ERISA plans, and that the Commission should merely cross-reference the requirements under ERISA.[1021]

[1012] *Id.*

[1013] *See* Exchange Act Section 15F(h)(1)(C) (authorizing the Commission to prescribe business conduct standards that relate to "such other matters as the Commission determines to be appropriate"). For a discussion of abuses associated with pay to play practices, *see* Section II.D.5, *infra*. *See* note 213, *supra*, and related text regarding an SBS Entity's reliance on a representation from the special entity to form this reasonable basis.

[1014] *See* note 32, *supra*.

[1015] *See* APPA, *supra* note 5. *See also* "Certain Political Contributions by SBS Dealers: Proposed Rule 15Fh–6" at Section II.D.4.a., *infra*.

[1016] *See* Exchange Act Section 15B(e)(4), 15 U.S.C 78o–4(e)(4) (defining "municipal advisor" as a person "other than a municipal entity or an employee of a municipal entity" that engages in the specified activities).

[1017] *See* Section 15F(h)(5)(A)(i)(VII) of the Exchange Act, 15 U.S.C. 78o–10(h)(5)(A)(i)(VII). *See* note 225, *supra*, and related text regarding an SBS Entity's reliance on a representation from the special entity to form this reasonable basis.

[1018] *See* notes 99, 198 and 189, *supra*, regarding the DOL's proposal to amend definition of "fiduciary" for purposes of ERISA.

[1019] *See* ABA Committees, *supra* note 5; ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[1020] *See* ABC, *supra* note 5; BlackRock, *supra* note 5; Mason, *supra* note 5.

Another commenter supported the presumptive qualification for ERISA plan fiduciaries, provided that the plan satisfied a minimum $1 billion net asset requirement for institutional investor organizations.[1022] The commenter asserted that no public policy objective would be achieved by permitting an SBS Entity to reject a risk manager fiduciary selected by a sophisticated institutional investor organization with over $1 billion in net assets, which did not require the protections of the rules.[1023] Another commenter advocated for the separate treatment of independent representatives of special entities subject to ERISA.[1024] Under this commenter's proposal, an SBS Entity that transacts with a special entity subject to Title I of ERISA must have a reasonable belief that the qualified independent representative is a fiduciary, as defined in Section 3 of ERISA.[1025] The commenter's proposed modification for ERISA special entities was intended to recognize "the unique fiduciary regime already applicable to such special entities," and to harmonize the Commission's criteria for qualified independent representatives with those of the CFTC.[1026]

One commenter asserted that, for ERISA plans, the determination whether a disclosure was "appropriate" and "timely" should be made with reference to ERISA.[1027] However, in the event the Commission imposed its own, separate requirements on such disclosures, the commenter requested that the Commission allow the following representations to satisfy this provision of the proposed rule: (1) That the representative shall provide the special entity with such information, at such times, as the special entity may reasonably request regarding any swap trade (either individually or in the aggregate) entered into by such representative on behalf of the special entity; and (2) that, in the absence of specific instruction to the contrary by the special entity regarding swap trade disclosure, the representative shall comply with the disclosure requirements imposed on the representative under other applicable law (*e.g.*, ERISA) and by the special entity under the special entity's investment management agreement and investment guidelines.[1028]

iii. Response to Comments and Final Rule

As discussed in Section II.H.5.b.iii, we are adopting a new Rule 15Fh–5(a)(2) that expressly addresses dealings with special entities subject to ERISA.

Under new Rule 15Fh–5(a)(2), (formerly proposed Rule 15Fh–5(a)(6)), an SBS Entity that acts as a counterparty to an employee benefit plan subject to Title I of ERISA must have a reasonable basis to believe that the special entity has a representative that is a fiduciary as defined in Section 3 of ERISA. In this regard, an ERISA fiduciary will be presumed to be a qualified independent representative, and the SBS Entity need not undertake further inquiry into the ERISA fiduciary's qualifications. Such a presumption acknowledges the pre-existing, comprehensive federal regulatory regime governing ERISA fiduciaries and the importance of harmonizing the Dodd-Frank Act requirements with ERISA to avoid unintended consequences.[1029] This formulation also will align the Commission's treatment of ERISA plans with that of the CFTC.

i. Safe Harbor

i. Summary of Comments

Although not included in the proposed rules, after adoption of the CFTC's final rules, one commenter requested that the Commission adopt separate safe harbors for transactions with ERISA and non-ERISA special entities regarding the requirement that an SBS Entity form a reasonable basis to believe that the special entity has a qualified independent representative.[1030] According to this commenter, the adoption of separate safe harbors for ERISA and non-ERISA special entities would align the Commission's requirements with those of the CFTC by recognizing the "unique fiduciary regime already applicable to" ERISA special entities, and, for transactions with non-ERISA special entities, the safe harbor would "help speed implementation, reduce costs, and mitigate counterparty confusion, because most special entity representatives have already taken steps to ensure that they can provide the representations contained in the CFTC's safe harbor." [1031]

ii. Response to Comments and Final Rule

After consideration of the comments, the Commission has determined to add a new bifurcated safe harbor in Rule 15Fh–5(b), similar to that adopted by the CFTC. The Commission believes the safe harbor will provide SBS Entities an efficient manner with which to comply with the requirement to have a reasonable basis to believe an independent representative meets certain enumerated qualifications while meeting the purposes of the rule.

Under Rule 15Fh–5(b)(1) as adopted, an SBS Entity shall be deemed to have a reasonable basis to believe that a non-ERISA special entity has a representative that satisfies the requirements of Rule 15Fh–5(a)(1) if: (i) The special entity represents in writing to the SBS Entity that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the requirements of Rule 15Fh–5(a)(1), and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with Rule 15Fh–5(a)(1); and (ii) the representative represents in writing to the special entity and the SBS Entity that the representative: Has policies and procedures reasonably designed to ensure that it satisfies the requirements of Rule 15Fh–5(a)(1); meets the independence test of Rule 15Fh–f(a)(1)(vii); has the knowledge required under paragraph (a)(1)(i) of this section; is not subject to a statutory disqualification under paragraph (a)(1)(ii) of this section; undertakes a duty to act in the best interests of the special entity as required under paragraph (a)(1)(iii) of this section; and is subject to the requirements regarding political contributions, as applicable, under paragraph (a)(1)(vi) of this section; and is legally obligated to comply with the requirements of Rule 15Fh–5(a)(1) by agreement, condition of employment, law, rule, regulation, or other enforceable duty.[1032]

Under Rule 15Fh–5(b)(2) as adopted, an SBS Entity shall be deemed to have a reasonable basis to believe that an ERISA special entity has a representative that satisfies the requirements of Rule 15Fh–5(a)(2), provided that the special entity provides in writing to the SBS Entity the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of ERISA. Obtaining the name and contact information provides the SBS Entity with basic information to investigate further if it becomes questionable whether it can reasonably rely on the special entity's representation or if the need arises for it to further investigate any of the representatives qualifications. In addition, it is highly likely that the SBS Entity will have the information in the ordinary course of negotiating the security-based swap if the independent representative is advising or negotiating the security-based swap on behalf of the special entity.

[1021] *See* ABC, *supra* note 5.

[1022] *See* ABA Committees, *supra* note 5.

[1023] *Id.*

[1024] *See* SIFMA (August 2015), *supra* note 5.

[1025] *Id.*

[1026] *Id.*

[1027] *See* ABC, *supra* note 5.

[1028] *Id.*

[1029] *See* Section I.D., *supra.*

[1030] *See* SIFMA (August 2015), *supra* note 5.

[1031] *Id.*

[1032] SBS Entities should keep in mind that reliance on these representation must be reasonable. As discussed in Section II.D, *supra*, reliance on a representation would not be reasonable if the SBS Entity has information that would cause a reasonable person to question the accuracy of the representation.

The Commission believes that the safe harbor will better enable an SBS Entity to fulfill its obligations under Rule 15Fh–5(a), while at the same time appropriately providing protections for special entities. The Commission also agrees with commenters that the safe harbor will increase the efficiency of SBS transactions, reduce costs, and mitigate counterparty confusion. We believe that although SBS Entities will need to obtain additional representations relating to meeting certain of the standards in Rule 15Fh–5(a)(1), most SBS Entities and special entity representatives will still be able to leverage any existing compliance infrastructure established pursuant to the CFTC's safe harbor.[1033] Additionally, as discussed above, the bifurcated nature of the safe harbor appropriately recognizes existing ERISA regulations.[1034]

7. Disclosure of Capacity

a. Proposed Rule

Proposed Rule 15Fh–5(b) would require that, before initiation of a security-based swap with a special entity, an SBS Dealer must disclose in writing the capacity or capacities in which it is acting, and, if the SBS Dealer engages in business or has engaged in business within the last twelve months with the counterparty in more than one capacity, the SBS Dealer must disclose the material differences between such capacities in connection with the security-based swap and any other financial transaction or service involving the counterparty.[1035] Therefore, an SBS Dealer that is acting as a counterparty but not an advisor to a special entity would need to make clear to the special entity the capacity in which it is acting (*i.e.,* that it is acting as a counterparty, but not as an advisor).

As noted in the Proposing Release, a firm might act in multiple capacities in relation to a special entity. For example, the firm might act as an underwriter in a bond offering, as well as a counterparty to a security-based swap used to hedge the financing transaction.[1036] Because the SBS Dealer's duty to the special entity might vary according to the capacity in which it is acting, the special entity and its independent representative should understand the SBS Dealer's roles in any transaction.[1037] The proposed rule would therefore require an SBS Dealer that engages in business, or has engaged in business within the last twelve months, with the counterparty in more than one capacity to disclose the material differences between such capacities in connection with the security-based swap and any other financial transaction or service involving the counterparty.[1038] The requirements of the proposed rule would apply to SBS Dealers, but not Major SBS Participants, because the statutory requirement, by its terms, requires disclosure in writing of "the capacity in which the *security-based swap dealer* is acting" (emphasis added).

b. Comments on the Proposed Rule

The Commission received five comment letters on this proposed rule. Three commenters expressed concern over the burden imposed on large institutions, which would have to identify and disclose a myriad of possible relationships with special entities.[1039] Conversely, one commenter suggested broadening the rule to apply to Major SBS Participants in addition to SBS Dealers.[1040] The last commenter suggested conforming the disclosure of capacity requirement to that of the CFTC.[1041]

The first commenter argued that the Commission's proposed capacity disclosure requirement was problematic for two reasons.[1042] First, it might conflict with some SBS Dealers' obligations to keep certain lines of business separated from one another. In this commenter's view, to comply with this requirement, large, multifaceted SBS Dealers that have different relationships with the same special entity could be forced to review activities throughout their entire organizations—in some cases, across informational walls that separate the different business lines of the firm. Second, the requirement might cause execution delays for special entities, since the SBS Dealer would need time to determine the disclosures it must make to the special entity. The commenter asked the Commission to clarify in the final rule that this disclosure requirement applied only to the SBS Dealer and the special entity, and that it would not apply to any associated persons of either the SBS Dealer or the special entity. The commenter additionally argued that the twelve-month look back period constituted a "moving target," and suggested that the Commission define the period as a calendar year, rather than a rolling twelve-month period.[1043]

Another commenter urged the Commission to allow SBS Entities to represent the capacity in which they were acting with respect to an ERISA plan in a schedule or amendment to an ISDA Master Agreement, other transactional document, or in an annual disclosure document provided by the SBS Entity to the special entity, which could be changed if the SBS Entity were to act in a different capacity.[1044] Because ERISA plans generally deal with SBS Entities as counterparties, the commenter believed this would be an effective and non-burdensome way to make such representations. The commenter additionally asserted that it might be harmful to a special entity to require an SBS Entity to disclose the myriad different capacities in which the SBS Entity has acted with respect to the special entity—since requiring SBS Dealers with diverse global operations to disclose every relationship with a plan (which often has multiple investment managers and service providers), then requiring the plan manager to review such disclosures would pose a significant administrative burden and result in high costs and delayed trades. These costs would likely be passed on to special entities.

[1033] *See* Section VI.C.4.iv., *infra.* However, the CFTC safe harbor does not require the representative to represent that it has the knowledge required under paragraph (a)(1)(i) of this section; is not subject to a statutory disqualification under paragraph (a)(1)(ii) of this section; undertakes a duty to act in the best interests of the special entity as required under paragraph (a)(1)(iii) of this section; and is subject to the requirements regarding political contributions, as applicable, under paragraph (a)(1)(vi) of this section.

[1034] *See* Section II.H.6.g., *supra.*

[1035] *See* Section 15F(h)(5)(A)(2)(i) of the Exchange Act, 15 U.S.C. 78o–10(h)(5)(A)(2)(i).

[1036] *See* Swap Financial Group Presentation at 55.

[1037] In the case of special entities that are municipal entities, MSRB Rule G–23 generally prohibits dealer-financial advisors from acting in multiple capacities in the same municipal securities transactions. *See also* MSRB Notice 2011–29 (May 31, 2011) (discussing rule amendment and interpretive notice). Similarly, Section 206(3) of the Investment Advisers Act of 1940 governs disclosure to a client when acting in certain capacities.

[1038] *See* proposed Rule 15Fh–5(b).

[1039] *See* SIFMA (August 2011), *supra* note 5; ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1040] *See* Better Markets (August 2011), *supra* note 5.

[1041] *See* SIFMA (August 2015), *supra* note 5.

[1042] *See* SIFMA (August 2011), *supra* note 5.

[1043] *Id.*

[1044] *See* ABC, *supra* note 5. Some commenters referenced both SBS Dealers and Major SBS Participants although the Commission only proposed to apply the requirement to SBS Dealers.

Another commenter argued that it "would be impossible for an SBS Entity to ascertain and disclose every other relationship it may have with its counterparties" because large financial institutions have multiple points of contact with counterparties, making it impossible to systematically collect and disclose the required information.[1045] This commenter argued that the Proposing Release did not include an analysis of the costs associated with the requirement to disclose capacity. The commenter recommended that the Commission narrow this requirement to cover only disclosure of the material differences between the capacities in which the SBS Entity itself (and not any of its affiliates or other associated persons) acted in connection with the relevant security-based swap transaction. In the alternative, the commenter suggested that the Commission require disclosure regarding the capacities in which the SBS Entity has acted with respect to the counterparty other than in connection with the relevant security-based swap transaction, and that the SBS Entity should be permitted to satisfy that requirement with a generic disclosure of the general types of capacities in which it may act or have acted with respect to the counterparty (along with a statement distinguishing those capacities from the capacity in which the SBS Entity is acting with respect to the present security-based swap).

One commenter suggested that the capacity disclosure requirement be applied equally to SBS Dealers and Major SBS Participants, as it would maximize the protection for special entities.[1046]

After the adoption of the CFTC's final rules, a commenter subsequently recommended deleting this twelve-month "look back" period, as well as the requirement that SBS Dealers disclose the material differences between such capacities "in connection with the security-based swap and any other financial transaction or service involving the counterparty."[1047] According to the commenter, these modifications would harmonize the Commission's rule with the parallel CFTC rule, and reduce confusion among counterparties regarding the nature of their relationship with an SBS Dealer.[1048]

c. Response to Comments and Final Rule

Upon consideration of the foregoing comments, the Commission is adopting proposed Rule 15Fh–5(b), renumbered as Rule 15Fh–5(c), with several modifications in response to comments. Proposed Rule 15Fh–5(b) would require that, before initiation of a security-based swap with a special entity, an SBS Dealer must disclose in writing the capacity or capacities in which it is acting, and, if the SBS Dealer engages in business or has engaged in business within the last twelve months with the counterparty in more than one capacity, the SBS Dealer must disclose the material differences between such capacities in connection with the security-based swap and any other financial transaction or service involving the counterparty. As discussed below, in response to comments, the Commission is amending the first part of the rule to clarify that the disclosure of the capacity in which the SBS Dealer is acting is "in connection with the security-based swap." The Commission also is amending the second part of the rule to clarify the capacities between which material differences must be disclosed. In addition, we are deleting the 12 month look-back period. Specifically, under the rule, as adopted (renumbered as Rule 15Fh–5(c)), before initiation of a security-based swap, an SBS Dealer must disclose to the special entity in writing the capacity in which the SBS Dealer is acting "in connection with the security-based swap," and, if the SBS Dealer engages in business[1049] with the counterparty in more than one capacity, the SBS Dealer must disclose the material differences between the capacity in which the SBS Dealer is acting with respect to the security-based swap and the capacities in which it is acting with respect to any other financial transaction or service involving the counterparty to the special entity.

Several commenters argued that the proposed requirement that the SBS Dealer disclose the capacity in which it was acting was too broad and would require the disclosure of a myriad of possible relationships.[1050] Some commenters suggested that the relevant disclosure should be the capacity in which the SBS Dealer is acting "in connection with the security-based swap" and suggested the rule should be narrowed accordingly.[1051] A commenter also suggested that the Commission revise the disclosure of different capacities to eliminate the language that requires such disclosures to be "in connection with the security-based swap and any other financial transaction or service involving the counterparty."[1052]

The Commission agrees with commenters that the disclosure of capacity in the first part of the rule should be limited to the capacity in which the SBS Dealer is acting in connection with the security-based swap, and has amended the rule to clarify this limitation. However, the Commission declines the commenter's suggestion to eliminate the disclosure of material differences between or among the different capacities in which the SBS Dealer is acting "in connection with the security-based swap and any other financial transaction or service involving the counterparty."[1053] The proposed rule was designed to provide the counterparty with sufficient information about the capacity in which the SBS Dealer is acting, and any material differences between its capacity in connection with the security-based swap and any other financial transaction or service involving the counterparty, to help ensure that the counterparty understands the SBS Dealer's role in the security-based swap transaction that is being initiated, and to distinguish that role, if applicable, from its role with respect to any other services it is providing or transactions in which it is involved with the counterparty. Eliminating the requirement that the SBS Dealer disclose the material differences in the different capacities in which it is acting would not address potential counterparty confusion that could arise when a SBS Dealer changes status from transaction to transaction.

Some commenters expressed concerns regarding the burden and practical issues relating to having to apply this disclosure requirement to the activities of associated persons of the SBS

[1045] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1046] *See* Better Markets (August 2011), *supra* note 5.

[1047] *See* SIFMA (August 2015), *supra* note 5.

[1048] *Id.*

[1049] As discussed below, the rule is designed to help ensure that the special entity understands the SBS Dealer's role in the security-based swap transaction that is being initiated, and to distinguish that role, if applicable, from its role with respect to any other services the SBS Dealer is providing or transactions in which it is involved with the special entity. The term "engages in" should be interpreted broadly to achieve that goal.

[1050] SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; and ABC, *supra* note 5.

[1051] *See* ABC, *supra* note 5; SIFMA (August 2011), *supra* note 5.

[1052] *See* SIFMA (August 2015), *supra* note 5.

[1053] *See* FIA/ISDA/SIFMA, supra note 5; and SIFMA (August 2015), *supra* note 5.

Dealer[1054] and associated persons of the special entity.[1055] The Commission recognizes the practical and operational difficulties described in the comment letters in determining the capacity in which associated persons, including affiliates, are acting or have acted with respect to the special entity. The Commission also recognizes the role of the independent representative in advising the special entity with respect to these transactions. Given these considerations, the Commission agrees with the commenter it would be appropriate for the SBS Dealer to use generalized disclosures regarding the other capacities in which the SBS Dealer and its associated persons, including affiliates, have acted or may act with respect to the special entity and its associated persons, along with a statement distinguishing those capacities from the capacity in which the SBS Dealer is acting with respect to the present security-based swap.[1056] Such disclosure would require consideration of the SBS Dealer's business and the types of capacities in which it and its associated persons has acted or may act with respect to the particular special entity. We believe that this generalized disclosure of other capacities will help ensure that the counterparty understands the SBS Dealer's role in the security-based swap transaction that is being initiated, and to distinguish that role, if applicable, from its role with respect to any other services it is providing or transactions in which it is involved with the counterparty.

After consideration of the comments, the Commission also acknowledges the commenters' concerns regarding the workability and potential delay in execution of transactions and increased costs the twelve month look back may cause. Accordingly, the Commission has also modified the adopted rule to eliminate the 12-month look back period for business in which the SBS Dealer has engaged.

As discussed in Section II.G.2.b. above, the Commission does not prescribe the manner in which these disclosure must be made. In response to comments received,[1057] the Commission notes that the required disclosures could be made in a transactional document or an annual disclosure document, depending on the number of capacities in which the SBS Dealer is acting and whether such capacities have changed. In any event, the disclosure must be sufficient to meet the requirements of the rule, which is designed to ensure that the special entity understands the SBS Dealer's role in the security-based swap transaction that is being initiated, and to distinguish that role, if applicable, from its role with respect to any other services the SBS Dealer is providing or transactions in which it is involved with the special entity.

Finally, the Commission declines to apply Rule 15Fh–5(c) to Major SBS Participants, since the statutory requirement, by its terms, requires disclosure in writing of "the capacity in which the security-based swap dealer is acting." Furthermore, as discussed in Section II.C., *supra,* we have not sought to impose the full range of business conduct requirements on these Major SBS Participants. We note that our approach in this regard largely mirrors that of the CFTC, under whose rules Swap Entities have operated for some time.

8. Exceptions for Anonymous, Special Entity Transactions on an Exchange or SEF

a. Proposed Rules

As previously discussed in Section II.B, *supra,* Section 15F(h)(7) of the Exchange Act provides that "[t]his subsection shall not apply with respect to a transaction that is (A) initiated by a special entity on an exchange or security-based swap execution facility; and (B) one in which the security-based swap dealer or major security-based swap participant does not know the identity of the counterparty to the transaction."[1058] We proposed to read Section 15F(h)(7) to apply to any transaction with a special entity on a SEF or an exchange where the SBS Entity does not know the identity of its counterparty.[1059] We further proposed exceptions from the requirement of proposed Rules 15Fh–4 (special requirements for SBS Dealers acting as advisors to special entities) and 15Fh–5 (special requirements for SBS Entities acting as counterparties to special entities) for such transactions.

b. Comments on the Proposed Rules

The Commission received five comments that generally addressed the exception for anonymous or SEF and exchange-traded security-based swaps,[1060] and five comments that specifically addressed the exception for anonymous, exchange or SEF-traded security-based swaps with special entities.[1061] The comment letters that generally address this exception are discussed above, in Section II.B, *supra.*

In the specific context of security-based swap transactions with special entities, one commenter suggested that the business conduct standards should only apply to non-SEF and non-exchange traded transactions, regardless whether the transaction is anonymous.[1062] This commenter urged the Commission to clarify that the proposed rules would not apply to any security-based swap transaction that is entered into by a special entity on a designated contract market or SEF.[1063]

Two commenters addressed the Commission's proposal to apply the statutory exception to any anonymous transaction with a special entity on a registered exchange or SEF.[1064] One commenter supported this proposal as a "reasonable approach which is consistent with Congressional intent that the enhanced protections apply to transactions where there is a degree of reliance by the special entity on the dealer or major swap participant."[1065] The second commenter argued that the exception in Section 15Fh(7) was intended to apply to all external business conduct requirements promulgated under subsection (h), and not merely those requirements relating to SBS Dealers acting as advisors or counterparties to special entities.[1066]

Another commenter argued that Congress did not intend for the exception to apply when SBS Entities initiate transactions on a SEF or an exchange.[1067] According to this commenter, SBS Entities seeking to conduct business on a SEF or exchange should bear the risk that their counterparties are special entities, as the risk would incentivize SBS Entities to determine the identity of their counterparties when they initiate security-based swap transactions on an SEF or exchange. The commenter recommended that the Commission adopt a "clear test" for determining when a special entity "initiates" a security-based swap transaction, and that the test differentiate between initiating a negotiation and initiating a transaction.[1068] After adoption of the CFTC's business conduct standards, another commenter urged the Commission to adopt an exception for exchange-traded security-based swaps that are intended to be cleared if: (1) The transaction is executed on a registered or exempt security-based swap execution facility or registered national security exchange; and (2) is of a type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Exchange Act; or (3) the SBS Dealer does not know the identity of the counterparty, at any time up to and including execution of the transaction.[1069] The commenter argued that these modifications would harmonize the scope of the SEC's special entity requirements with the parallel CFTC requirements set forth under the relief provided by CFTC No-Action Letter 13–70.[1070]

[1054] *See* SIFMA (August 2011), *supra* note 5.

[1055] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1056] *Id.*

[1057] *See* ABC, *supra* note 5.

[1058] 15 U.S.C. 78o–10(h)(7).

[1059] *See* Proposing Release, 76 FR at 42421, *supra* note 3.

[1060] *See* CFA, *supra* note 5; SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; MFA, *supra* note 5; BlackRock, *supra* note 5.

[1061] *See* ABC, *supra* note 5; SIFMA (August 2015), *supra* note 5; CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1062] *See* ABC, *supra* note 5.

[1063] *Id.*

[1064] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1065] *See* CFA, *supra* note 5.

[1066] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1067] *See* Better Markets (Aug. 2011), *supra* note 5.

c. Response to Comments and Final Rules

After consideration of the comments, the Commission is adopting Rule 15Fh–4(b)(3) and Rule 15Fh–5(c) (the latter renumbered as 15Fh–5(d)) with several modifications. Under the rules as adopted, the business conduct requirements of Rules 15Fh–4 and 15Fh–5 will not apply to a security-based swap with a special entity if: (1) The transaction is executed on a registered SEF, exempt SEF, or registered national securities exchange; and (2) the SBS Dealer and/or Major SBS Participant does not know the identity of the counterparty at a reasonably sufficient time prior to the execution of the transaction to permit the SBS Dealer and/or Major SBS Participant to comply with the obligations of the rule.[1071] The language of these exceptions, as adopted, differs from the language of the proposed rules, which would have applied the exceptions where the SBS Dealer or Major SBS Participant did not know the identity of its counterparty "at any time up to and including" execution of the transaction, and only to transactions executed on a *registered* SEF or national exchange.

As discussed in Section II.B, by limiting the scope of the business conduct standards to situations where the counterparty's identity is known at a reasonably sufficient time prior to the execution of a transaction to permit the SBS Dealer and/or Major SBS Participant to comply with the obligations of the rule, the Commission seeks to relieve SBS Dealers and/or Major SBS Participants of the duty to comply with the rules' requirements where the counterparty's identity is learned immediately prior to the execution of a transaction, so that the SBS Entity would be able to comply with the requirements of the rules in a manner that would not be disruptive to the counterparties to the transaction. This change is intended to address commenters' concerns that compliance with the rules might be unreasonable or impractical where a counterparty's identity is learned immediately prior to the transaction, and compliance could result in the delay or disruption of the transaction.[1072] Such delay or disruption would negate a primary advantage of electronic trading and discourage market participants from executing security-based swaps on electronic platforms. By only applying the rules' requirements to situations where the counterparty's identity is known "at a reasonably sufficient time prior to" the execution of a transaction, the rules' requirements are limited to situations where an SBS Entity has sufficient time before the execution of the transaction to comply with its obligations under the rules. For this reason, we decline to adopt language, suggested by a commenter, which would apply the exception to circumstances where the identity of the counterparty "is not known at any time up to and including execution of the transaction." [1073] For clarification, and in response to commenters,[1074] the exception would encompass transactions that are executed by an SBS Entity on a registered or exempt SEF or registered national securities exchange via a request for quote method, as long as the identity of the counterparty is not known to the SBS Entity at a reasonably sufficient time prior to the execution of a transaction to permit the SBS Entity to comply with the obligations of the rules.[1075]

Also, as explained in Section II.B, the exception would apply with respect to transactions on exempt as well as registered SEFs. We believe that including transactions on exempt SEFs is appropriate since, as discussed in Section II.B, the practical considerations that underlie the exception are not affected by whether a SEF is registered or not.

We believe that the exceptions under Rule 15Fh–4(b)(3) and 15Fh–5(d), as adopted, appropriately interpret the intended statutory carve-outs for SBS Entities engaged in anonymous, registered exchange-traded, registered or exempt SEF transactions with special entities, while avoiding the ambiguity inherent in determining which party "initiated" the security-based swap. The final rule therefore obviates the need to differentiate between initiating a negotiation and initiating a transaction, as one commenter had requested.[1076]

We acknowledge the commenter's suggestion that the exception should apply irrespective of which party initiates a transaction,[1077] as well as another commenter's suggestion that Congress may have intended to deny the exception in situations in which an SBS Entity initiates a transaction, so that SBS Entities would be incentivized to determine the identities of their counterparties when they initiate security-based swap transactions.[1078] As explained in Section II.B, we understand there may be practical difficulties in determining which counterparty "initiates" a transaction on a SEF or an exchange. However, we believe the rules adopted today avoid the ambiguity inherent in determining which party "initiated" the security-based swap, while appropriately interpreting the intended statutory carve-outs for SBS Entities that execute anonymous, security-based swap transactions with special entities on a registered or exempt SEF or registered national securities exchange.

We are not accepting the commenter's suggestion that we revise the exceptions under 15Fh–4(b)(3) and 15Fh–5(d) to include transactions that are intended or required to be cleared, which are either executed on a registered national securities exchange or SEF, regardless of whether the transaction is anonymous.[1079] Similarly, we reject commenters' more general assertion that the exceptions should apply to all SEF or exchange traded transactions, even where the identity of the counterparty is known.[1080] Rather, we agree with the commenter that it is appropriate to apply the protections of the business conduct rules to all security-based swap transactions with special entities other than anonymous transactions executed on a registered national securities exchange or SEF.[1081] The rules adopted today are intended to provide certain protections for special entities, and we think it is appropriate to apply the rules, to the extent practicable, so that special entities receive the benefits of those protections. Where the identity of the special entity is known, we believe that it is appropriate to apply the rules so that the special entity receives the benefits of the protections provided by the rules, including the assistance of an advisor or qualified independent representative acting in the best interests of that special entity.

[1068] *Id.*

[1069] *See* SIFMA (August 2015), *supra* note 5.

[1070] *Id.*

[1071] As noted above, Rule 15Fh–4 applies only to SBS Dealers, whereas Rule 15Fh–5 applies to both SBS Dealers and Major SBS Participants. *See* Sections II.H.2 and II.H.5.a.iii.A, respectively, *supra.*

[1072] *See* CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1073] *See* SIFMA (August 2015), *supra* note 5.

[1074] *See* FIA/ISDA/SIFMA, *supra* note 5; MFA, *supra* note 5.

[1075] The rule will apply to situations where an SBS Entity negotiates or pre-arranges a security-based swap transaction with a special entity and routes such a pre-arranged transaction through a SEF or registered national securities exchange. In such instances, we believe the SBS Entity would have known the identity of the counterparty at a reasonably sufficient time prior to the execution of the transaction to permit the SBS Entity to comply with the obligations of the rule.

[1076] *See* Better Markets (August 2011), *supra* note 5.

[1077] *See* CFA, *supra,* note 5.

[1078] *See* Better Markets (August 2011), *supra* note 5.

[1079] *See* SIFMA (August 2015), *supra* note 5.

Lastly, we acknowledge the improbability that an SBS Dealer who is acting as an advisor to a special entity and is therefore subject to the requirements of Rule 15Fh–4 would not know the identity of its special entity counterparty. Consequently, we also acknowledge that the circumstances where the exception under Rule 15Fh–4(b)(3) would apply are unlikely, and, in any event, we would question the appropriateness of an SBS Dealer making a recommendation to an unknown special entity. Nevertheless, we believe there is value is providing legal certainty for SBS Dealers that seek to transact on a registered national securities exchange or a registered or exempt SEF without regard to the regulatory status of their counterparty.

9. Certain Political Contributions by SBS Dealers

a. Proposed Rule

As proposed, Rule 15Fh–6(b)(1) would generally make it unlawful for an SBS Dealer to offer to enter into, or enter into, a security-based swap, or a trading strategy involving a security-based swap, with a "municipal entity" within two years after any "contribution" to an "official of such municipal entity" has been made by the SBS Dealer or any of its "covered associate[s]." Proposed Rule 15Fh–6(b)(3)(i) would also prohibit an SBS Dealer from paying a third party to "solicit" municipal entities to offer to enter into, or enter into, a security-based swap, unless the third party is a "regulated person" that is itself subject to a pay to play restriction under applicable law. Proposed Rule 15Fh–6(b)(3)(ii) would prohibit an SBS Dealer from coordinating or soliciting a third party, including a political action committee, to make any: (a) Contribution to an official of a municipal entity with which the SBS Dealer is offering to enter into, or has entered into, a security-based swap, or (b) payment to a political party of a state or locality with which the SBS Dealer is offering to enter into, or has entered into, a security-based swap. Finally, proposed Rule 15Fh–6(c) would make it unlawful for an SBS Dealer to do indirectly or through another person or means anything that would, if done directly, result in a violation of the prohibitions contained in the proposed rule.

As proposed, Rule 15Fh–6(b) included three main exceptions. First, proposed Rule 15Fh–6(b)(2)(i) would permit an individual who is a covered associate to make aggregate contributions without being subject to the two-year time out period, of up to $350 per election, to any one official for whom the individual was entitled to vote at the time of the contributions, and up to $150 per election, to any one official for whom the individual was not entitled to vote at the time of the contributions.[1082] Second, proposed Rule 15Fh–6(b)(2)(ii) would not apply the proposed pay to play rules to contributions made by an individual more than six months prior to becoming a covered associate of the SBS Dealer, unless such individual solicits the municipal entity after becoming a covered associate. Third, proposed Rule 15Fh–6(b)(2)(iii) would not apply the proposed pay to play rules to a security-based swap that is initiated by a municipal entity on a registered national securities exchange or SEF, for which the SBS Dealer does not know the identity of the counterparty at any time up to and including the time of execution of the transaction.

In addition to the above exceptions, proposed Rule 15Fh–6(e)(1) would provide an automatic exception to allow an SBS Dealer a limited ability to cure the consequences of an inadvertent political contribution where: (i) The SBS Dealer discovered the contribution within four months (120 calendar days) of the date of the contribution; (ii) the contribution made did not exceed $350; and (ii) the contribution was returned to the contributor within 60 calendar days of the date of discovery. However, an SBS Dealer would not be able to rely on this exception more than twice in any 12-month period, or more than once for any covered associate, regardless of the time between contributions.

Furthermore, under proposed Rule 15Fh–6(d) an SBS Dealer may apply to the Commission for an exemption from the two-year ban. In determining whether to grant the exemption, the Commission would consider, among other factors: (i) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Exchange Act; (ii) whether the SBS Dealer, (a) before the contribution resulting in the prohibition was made, had adopted and implemented policies and procedures reasonably designed to prevent violations of the proposed rule, (b) prior to or at the time the contribution was made, had any actual knowledge of the contribution, and (c) after learning of the contribution, had taken all available steps to cause the contributor to obtain return of the contribution and such other remedial or preventative measures as may be appropriate under the circumstances; (iii) whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the SBS Dealer, or was seeking such employment; (iv) the timing and amount of the contribution; (v) the nature of the election (*e.g.*, state or local); and (vi) the contributor's intent or motive in making the contribution, as evidenced by the facts and circumstances surrounding the contribution.

b. Comments on the Proposed Rule

Six commenters addressed proposed Rule 15Fh–6.[1083] One commenter, who supported the proposal as applied to SBS Dealers, stated that pay-to-play is an appropriate area for the Commission to exercise its authority and suggested that this proposal "would help to eliminate what would otherwise be a serious gap in protections."[1084] However, this same commenter does not believe the Commission should exempt Major SBS Participants from the proposed pay-to-play rules based on what this commenter claims "may turn out to be a false 'assumption' that they will not be engaged in the type of activity that would make them appropriate."[1085]

[1080] *See* ABC, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1081] *See* CFA, *supra* note 5.

[1082] As discussed below, we are modifying the text of this rule to clarify that the *de minimis* contribution exception is limited to contributions made by individuals so that the rule text tracks the explanation of the exception that was outlined in the Proposing Release and in the CFTC's Adopting Release for its analogous exception, as well as the text of the Advisers Act Rule, upon which the exception is modeled and is intended to complement.

[1083] *See* APPA, *supra* note 5; CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; NAIPFA, *supra* note 5; SIFMA (August 2011), *supra* note 5; SIFMA (August 2015), *supra* note 5.

[1084] CFA, *supra* note 5.

Another commenter agreed that the prohibition timeframe should be two years, consistent with proposed Rule 15Fh–6(b)(1).[1086] That same commenter also believed that there are no circumstances where an independent representative that is advising a special entity that is a State, State agency, city, county, municipality, or other political subdivision of a State, or a governmental plan, as defined in Section 3(32) of ERISA, other than an employee of the special entity, would not be subject to pay to play rules.[1087]

One commenter recommended that, with respect to the proposal that independent representatives be subject to "pay to play" limitations, an exception is needed "for advisors that are employees of the special entity, given the employer-employee relationship."[1088] That same commenter also urged the Commission to delay imposing the proposed pay to play rule until after the "dealer" definitions are finalized.[1089]

Another commenter suggested, as a general matter, that because the Dodd-Frank Act did not mandate any restrictions on political contributions by SBS Dealers it is not clear to that commenter that the Commission needs to impose such a requirement on a discretionary basis.[1090] This same commenter, however, recommended that the Commission revise the language of the proposed rule to, at least in the commenter's view, parallel the following aspects of MSRB's regulations: (1) Replace as the triggering occasion for the application of the proposed rule an "offer to enter into or enter into a security-based swap or a trading strategy involving a security-based swap" with a term—"engage in municipal security-based swap business"—which they suggest is "more akin to the terms used in the relevant MSRB Rules"; (2) define "municipal security-based swap business" in the proposed rule to mean "the execution of a security-based swap with a municipal entity"; (3) narrow the definition of "solicit" in the proposed rule to include only "any direct communication by any person with a municipal entity for the purpose of obtaining or retaining municipal security-based swap business," so that the term "solicit" does not "implicate communication by employees of a financial institution that do not have a role in the security-based swap business and who are already regulated by the MSRB or the SEC"; (4) clarify the definition of "solicit" in the proposed rule to "exclude[s] any communication by any person with a municipal entity for the sole purpose of obtaining or retaining any other type of business covered under pay to play restrictions, such as municipal securities business or municipal advisory business"; and (5) modify the proposed rule to allow for up to three exemptions for inadvertent contributions, depending on the number of SBS Dealer employees.[1091] The same commenter also recommended that the Commission include a provision specifying "an operative date of the rule such that it only applies to contributions made on or after its effective date."[1092]

Finally, one commenter suggested that the Commission create a safe harbor from the pay to play rule for a special entity that is represented by a qualified independent representative that affirmatively selects the SBS Dealer.[1093] That commenter also suggests excluding state-established plans that are managed by a third-party, such as 529 college savings plans, from the pay to play provisions because otherwise, the provisions would deter SBS Dealers from transacting with the plans.

After the adoption of the CFTC's rules in 2015, this same commenter subsequently proposed that the Commission expressly except from the prohibitions of Rule 15Fh–6(b)(1) contributions that were "made before the security-based swap dealer registered with the Commission as such."[1094] According to the commenter, these changes would be consistent with CFTC No-Action relief, which clarified that the "look back" period would not include any time period before an SBS Dealer is required to register as such, and would therefore prevent retroactive application of the rule.[1095] The commenter further suggested that the Commission modify the exception under 15Fh–6(b)(2)(B)(iii), such that it would apply to a security-based swap that was "executed" by a municipal entity on a registered national securities exchange or registered or an "exempt" security-based swap execution facility, and was of a "type that is, as of the date of execution, required to be cleared pursuant to Section 3C of the Act."[1096] In the alternative, the commenter suggested that the exception should apply where the SBS Dealer does not know the identity of the counterparty to the transaction at any time up to and including execution of the transaction.[1097]

c. Response to Comments and Final Rule

After considering the comments, the Commission is adopting Rule 15Fh–6 with six modifications. First, after the Proposing Release was published, an inadvertent omission was identified in the definition of "contribution" in proposed Rule 15Fh–6(a)(1)(i). The Proposing Release inadvertently omitted the word "federal" in subsection (i) of the proposed definition of "contribution" in Rule 15Fh–6(a)(1). Although the Commission did not receive any comments noting this omission, we are modifying the rule text to include the word "federal" in subsection (i) of the final definition of "contribution" in Rule 15Fh–6(a)(1)).[1098] Furthermore, and as stated in the Proposing Release, the Commission explained that "Rule 15Fh–6 is modeled on, and intended to complement, existing restrictions on pay to play practices under Advisers Act Rule 206(4)–5 . . . and under MSRB Rules G–37 and G–38."[1099] Importantly, both Advisers Act Rule 206(4)–5(f)(1)(i) and MSRB Rule G–37(g)(i)(A)(1) include the word "federal" in their largely identical definitions of the term "contribution." The Commission is correcting this inadvertent omission to make the definition of "contribution" in Rule 15Fh–6(a)(1)(i) consistent with the

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[1085] CFA, *supra* note 5.

[1086] *See* NAIPFA, *supra* note 5.

[1087] *See* NAIPFA, *supra* note 5.

[1088] APPA, *supra* note 5.

[1089] APPA, *supra* note 5 (stating in support of that suggestion that "[w]hile financial institutions that deal with municipal entities are more likely to have compliance procedures in place to deal with pay-to-play rules, other entities that may ultimately be considered SBS Dealers are much less likely to have such systems in place or to be familiar with these types of rules").

[1090] *See* FIA/ISDA/SIFMA, *supra* note 5 (stating that MSRB rules "on political contributions made in connection with municipal securities business will already cover most [SBS Dealers] doing business with municipal entities, and, there may not be much marginal benefit to imposing additional restrictions on SBSDs generally"). *See also id.* ("Because the Commission's proposal is nearly identical to the CFTC Proposal, our comments generally track those we made in response to the CFTC Proposal.").

[1091] FIA/ISDA/SIFMA, *supra* note 5.

[1092] FIA/ISDA/SIFMA, *supra* note 5.

[1093] *See* SIFMA (August 2011), *supra* note 5.

[1094] *See* SIFMA (August 2015), *supra* note 5.

[1095] *Id.*

[1096] *Id.*

[1097] *Id.*

[1098] As such, Final Rule 15Fh–6(a)(1)(i) will read "[f]or the purpose of influencing any election for *federal*, state or local office." In light of this modification, and for purposes of internal consistency with a parenthetical reference to this rule text elsewhere in the rule, a parallel modification is being made to Final Rule 15Fh–6(d)(5), which will read: "The nature of the election (*e.g., federal*, state or local)."

[1099] Proposing Release, 76 FR at 42433, *supra* note 3.

Commission's existing definition of "contribution" under Advisers Act Rule 206(4)–5(f)(1)(i).[1100] Correcting this omission also will make the definition of "contribution" in Rule 15Fh–6(a)(1) consistent with the existing definition of "contribution" under CFTC Regulation 23.451(a)(1)(i) and, therefore, create a harmonized regulatory framework that complements and is comparable to Advisers Act Rule 206(4)–5, MSRB Rules G–37 and CFTC Regulation 23.451.[1101] Based on the foregoing, the Commission believes that correcting this inadvertent omission in a rule that was, as set forth in the Proposing Release, "modeled on, and intended to complement, existing restrictions on pay to play practices"[1102] will eliminate an unintentional gap in pay to play protections across regulatory regimes that would otherwise be created. In light of cross-market participation and expected dual registration of some entities, substantial consistency across pay to play regulatory regimes, including having largely consistent definitions of "contribution," will also be helpful for those entities that have already established a regulatory infrastructure to comply with pay to play standards under existing rules.

Second, the Commission is correcting another inadvertent omission in the text of Rule 15Fh–6(b)(2)(i). As outlined in the Proposing Release, the *de minimis* contribution exception found in Rule 15Fh–6(b)(2)(i) is intended to be limited to contributions made by individuals that are covered associates to track and complement the similar *de minimis* contribution exception found in Advisers Act Rule 206(4)–5(b)(1), upon which this exception was modeled.[1103] Because this exception is conditioned on whether the covered associate was entitled to vote for the official at the time of the contribution, we believe it was implicit in the proposed rule text that this exception only applies to contributions made by a natural person since other legal persons are not entitled to vote. However, we are modifying the text of Rule 15Fh–6(b)(2)(i) to clarify that this exception only applies to contributions made by a natural person. With that modification, the rule text as adopted will track the explanation behind this exception, as explained in the Proposing Release, as well as the text of Advisers Act Rule 206(4)–5(b)(1). This modification will also make Rule 15Fh–6(b)(2)(i) consistent with the CFTC's analogous *de minimis* contribution exception, which the CFTC described as similarly intended to be limited to individuals that are covered associates.[1104]

Third, as discussed in Section II.B, the Commission is modifying the exception under Rule 15Fh–6(b)(2)(iii) so as to apply when the SBS Dealer does not know the identity of the counterparty with reasonably sufficient time prior to execution of the transaction to permit the SBS Dealer to comply with the obligations of the rule. This language differs from the language used in the proposal, which would apply the exception when the dealer does not know the identity of the counterparty "at any time up to and including execution of the transaction." The adoption of this language will comport with the language used in the verification of counterparty status and disclosure requirements of final Rule 15Fh–3, as well as the exceptions to the special entity requirements under Rules 15Fh–4(b)(3) and 15Fh–5(d). As discussed in those sections, this language is intended to exclude situations where the identity of the counterparty is not discovered until after execution of a transaction, or where the SBS Dealer learns the identity of the counterparty with insufficient time to be able to satisfy its obligations under the rule without delaying the execution of the transaction.

Fourth, as discussed above in Section II.H.8, the Commission is also modifying the exception under Rule 15Fh–6(b)(2)(iii) to apply to all security-based swap transactions executed on a registered or exempt SEF or registered national securities exchange, rather than just with respect to transactions "initiated by a municipal entity" on such exchange or SEF (as long as the other conditions of Rule 15Fh–6(b)(2)(iii) are met). We are revising the rule to be consistent with the adopted Rules 15Fh–4(b)(3) and 15Fh–5(d), and avoid the ambiguity inherent in determining which party "initiated" the security-based swap.[1105]

Fifth, we are also modifying Rule 15Fh–6(e)(2), as one commenter suggested,[1106] to allow for up to three exemptions for inadvertent contributions per calendar year, depending on the number of natural person covered associates at the SBS Dealer. Specifically, we are modifying the text of Rule 15Fh–6(e)(2), as suggested by this same commenter,[1107] to provide that an SBS Dealers that has more than 50 covered associates would be able to rely on this exception no more than three times per calendar year, while an SBS Dealer that has 50 or fewer covered associates would be able to rely on this exception no more than two times per calendar year. This modification will parallel the provision in Advisers Act Rule 206(4)–5, which also allows "larger" investment advisers to avail themselves of three automatic exceptions, instead of two, in any calendar year. As the Commission noted when modifying its Advisers Act rule proposal to include three automatic exceptions for larger firms, we agree that inadvertent violations of the rule are more likely at firms with greater numbers of covered associates, and we believe that the twice per year limit is appropriate for smaller firms and that the three times per year limit is appropriate for larger firms.[1108]

[1100] *See* Political Contributions by Certain Investment Advisers, Advisers Act Release No. 3043 (Jul. 1, 2010), 75 FR 41018 (Jul. 14, 2010) ("Advisers Act Pay-to-Play Release") (adopting Advisers Act Rule 206(4)–5 and stating, among other things, that the definition of "contribution" in Advisers Act Rule 206(4)–5 "is the same as . . . the one used in MSRB rule G–37").

[1101] Although subsection (iii) of CFTC Regulation 23.451(a)(1) also includes the term "federal" in the definition of "contribution"—"[f]or transition or inaugural expenses incurred by the successful candidate for federal, state, or local office."—as explained by the Commission in the Advisers Act Pay-to-Play Release, neither Rule 206(4)–5 nor MSRB Rule G–37 includes the transition or inaugural expenses of a successful candidate for *federal* office in the definition of "contribution." *See* Advisers Act Pay-to-Play Release, 75 FR at 41030, n.154, *supra* note 1100. Therefore, because this rule is modeled on, and intended to complement, existing restrictions on pay to play practices under Advisers Act Rule 206(4)–5 and MSRB Rules G–37, we also do not include the term "federal" in subsection (iii) of Rule 15Fh–6(a)(1) for the same reasons stated by the Commission when adopting the Advisers Act pay-to-play rules.

[1102] Proposing Release, 76 FR at 42433, *supra* note 3.

[1103] *See* Proposing Release, 76 FR at 42434, *supra* note 3 ("The proposed rule would permit *an individual* who is a covered associate to make aggregate contributions without being subject to the two-year time out period, of up to $350 per election, for any one official for whom *the individual* is entitled to vote, and up to $150 per election, to an official for whom *the individual* is not entitled to vote.") (emphases added).

[1104] *See* CFTC Adopting Release, 77 FR at 9799, *supra* note 21 (explaining that CFTC's "proposed rule permitted *an individual* that is a covered associate to make aggregate contributions up to $350 per election, without being subject to the two-year time out period, to any one official for whom *the individual* is entitled to vote, and up to $150 per election to an official for whom *the individual* is not entitled to vote.") (emphases added).

[1105] *See supra* Section II.H.8.

[1106] FIA/ISDA/SIFMA, *supra* note 5 (suggesting that the Commission modify proposed rule to allow for up to three exemptions for inadvertent contributions, depending on the number of SBS Dealer employees).

[1107] *See id.* (suggesting that the Commission modify proposed rule to parallel the provisions in SEC Rule 206(4)–5, relating to contributions from certain covered associates of investment advisers).

[1108] *See* Advisers Act Pay-to-Play Release, 75 FR at 41035–36, n. 238, *supra* note 1100 ("We do not believe it is appropriate for there to be greater variation in the number of times advisers may rely

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Although we recognize that this modification will create an additional exception not found in the CFTC's analogous rule,[1109] we believe that harmonization across the Commission's regulatory regimes will help to create regulatory efficiencies for entities that have already established a regulatory infrastructure based on the Commission's analogous exception.

Finally, the Commission is also correcting in the final rule the following typographical errors: (1) Revising an internal cross-reference in Rule 15Fh–6(a)(2)(iii) to cross-reference "paragraphs (a)(2)(i) and (a)(2)(ii) of this section" rather than "paragraphs (c)(2)(i) and (c)(2)(ii) of this section"; (2) revising an internal cross-reference in Rule 15Fh–6(d) to cross-reference "paragraph (b) of this section" rather than "paragraph (a)(1) of this section"; (3) revising Rule 15Fh–6(b)(3)(ii)(A) to delete a phrase that was inadvertently repeated "a security-based swap security-based swap"; and (4) revising Rule 15Fh–6(b)(3)(ii)(B) to also delete a phrase that was inadvertently repeated "a security-based swap security-based swap."

With respect to the balance of Rule 15Fh–6, after considering the comments submitted, the Commission is adopting the Rule as proposed. The Commission disagrees with certain commenters' view that Rule 15Fh–6 is not an appropriate area for the Commission to exercise its authority to prescribe business conduct standards.[1110] The Commission also disagrees with one commenter's suggestion that there may not be much marginal benefit to imposing additional restrictions on SBS Dealers generally.[1111] We proposed the rule in the context of security-based swaps because pay to play practices may result in municipal entities entering into transactions not because of hedging needs or other legitimate purposes, but rather because of campaign contributions given to an official with influence over the selection process. Where pay to play exists, SBS Dealers may compete for security-based swap business based on their ability and willingness to make political contributions, rather than on their merit or the merit of a proposed transaction. We believe these practices may result in significant harm to municipalities and others in connection with security-based swap transactions, just as they do in connection with other municipal securities transactions.[1112] We note that SBS Dealers may have an incentive to participate in pay to play practices out of concern that they may be overlooked if they fail to make such contributions. These concerns, coupled with the furtive nature of pay to play practices and the inability of markets to properly address them, strongly support the need for prophylactic measures to address them in the context of security-based swaps.[1113] Furthermore, and as the same commenter concedes, there would still be a regulatory gap as only "most" SBS Dealers would be covered and, as another commenter observed, this rule would help to eliminate that gap in protection.[1114] We made this same point in the Proposing Release, noting that while Rule 15Fh–6 is consistent with and would complement the pay to play prohibition adopted by the MRSB and CFTC, there are no existing federal pay to play rules that would apply to *all* SBS Dealers in their dealings with municipal entities.[1115] Therefore, this rule was proposed to help eliminate that regulatory gap.

The Commission continues to believe and a commenter also agrees that the two-year time out provided for in Rule 15Fh–6 is appropriate.[1116] As explained in the Proposing Release, Rule 15Fh–6(b)(1) would prohibit an SBS Dealer from offering to enter into, or entering into, a security-based swap or a trading strategy involving a security-based swap, with a municipal entity within two years after a contribution to an official of such municipal entity has been made by the SBS Dealer or any of its covered associates. We believe the two-year time out requirement strikes an appropriate balance, as it is sufficiently long to act as a deterrent but not so long as to be unnecessarily onerous. The two-year time out is generally consistent with the time out provisions in Advisers Act Rule 206(4)–5, MSRB Rule G–37 and CFTC Regulation 23.451.

As we also explained in the Proposing Release, because the rule would attribute to an SBS Dealer those contributions made by a person even prior to becoming a covered associate of the SBS Dealer, SBS Dealers need to "look back" in time to determine whether the two-year time out applies when an employee becomes a covered associate.[1117] Given that one commenter suggested further specificity as to whether the rule applies only to contributions made on or after the rules effective date,[1118] we are interpreting the prohibition in Rule 15Fh–6(b)(1) and its exceptions in Rule 15Fh–6(b)(2), as well as the restrictions on soliciting or coordinating contributions found in Rule 15Fh–6(b)(3), to not be triggered for an SBS Dealer or any of its covered associates by contributions made *before* the SBS Dealer registered with the Commission as such. This interpretation is, as one commenter noted, also consistent with CFTC No-Action relief.[1119] However, such prohibitions will apply to contributions made on or after the SBS Dealer is required to register with the Commission. We also note that these prohibitions do not apply to contributions made *before* the compliance date of this rule by new covered associates to which the rule's "look back" applies (*i.e.*, a person who becomes a covered associate within two years after the contribution is made).

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on the exception than that based either on their size or on other characteristics. We are seeking to encourage robust monitoring and compliance.").

[1109] *See* CFTC Adopting Release, 77 FR at 9828, *supra* note 21.

[1110] *See, e.g.*, FIA/ISDA/SIFMA, *supra* note 5 (suggesting that because Dodd-Frank did not mandate any restrictions on political contributions by SBS Dealers it is not clear that the Commission needs to impose such a requirement on a discretionary basis). *But see* CFA, *supra* note 5.

[1111] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1112] *See id. See SEC* v. *Larry P. Langford*, Litigation Release No. 20545 (Apr. 30, 2008) and *SEC* v. *Charles E. LeCroy*, Litigation Release No. 21280 (Nov. 4, 2009) (charging Alabama local government officials and J.P. Morgan employees with undisclosed payments made to obtain municipal bond offering and swap agreement business from Jefferson County, Alabama). *See also J.P. Morgan Securities Inc.*, Securities Act Release No. 9078 (Nov. 4, 2009) (settled order instituting administrative and cease-and-desist proceedings and imposing remedial sanctions against a broker-dealer that the Commission alleged was awarded bond underwriting and interest rate swap agreement business by Jefferson County in connection with undisclosed payments by employees of the firm).

[1113] *Cf. Blount* v. *SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1351 (1996) ("no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic").

[1114] CFA, *supra* note 5 (supporting the proposal as applied to SBS Dealers and stating that this proposal "would help to eliminate what would otherwise be a serious gap in protections").

[1115] Proposing Release, 76 FR at 42433, *supra* note 3.

[1116] *See* NAIPFA, *supra* note 5.

[1117] *See* Proposing Release, 76 FR at 42434, *supra* note 3. In the Proposing Release, we explained, as an example, that if the contribution at issue was made less than two years (or six months, as applicable under Rule 15Fh–6(b)(2)(ii)) before an individual becomes a covered associate, the rule would prohibit the firm from entering into a security-based swap with the relevant municipal entity until the two-year time out period has expired. As noted above, Rule 15Fh–6(b)(2)(ii) provides an exception to the prohibition in Rule 15Fh–6(b)(1) such that the prohibition would not apply to contributions made by an individual more than six months prior to becoming a covered associate of the SBS Dealer, unless such individual solicits the municipal entity after becoming a covered associate.

[1118] *See* FIA/ISDA/SIFMA, *supra* note 5 (requesting clarification that "the rule would not unintentionally ban SBS activity as a result of contributions made during the pre-effectiveness period"). *See also* SIFMA (August 2015), *supra* note 5.

[1119] *See* SIFMA (August 2015), *supra* note 5. *See also* CFTC Letter No. 12–33 (November 29, 2012).

This interpretation is similar to the approach taken by the Commission in connection with Advisers Act Rule 206(4)–5.[1120] For example, if an individual who becomes a covered associate on or after the effective date of the rule made a contribution *before* the effective date of the rule, that new covered associate's contribution would not trigger the two-year time out. On the other hand, if an individual who later becomes a covered associate made the contribution on or after the compliance date of this rule, the contribution would trigger the two-year time out if it were made less than, as applicable, six months or two years before the individual became a covered associate.[1121]

With respect to the comment recommending amending the proposed rule to include Major SBS Participants in the prohibitions of Rule 15Fh–6,[1122] the Commission does not believe that it is necessary or appropriate to do so. We have considered how the differences between the definitions of SBS Dealer and Major SBS Participant may be relevant in formulating the business conduct standards applicable to these entities.[1123] The Commission does not believe it is necessary to revisit its assumption, outlined in the Proposing Release, that Major SBS Participants are unlikely to give rise to the pay-to-play concerns that this rule is intended to address.[1124] As discussed above, SBS Dealers may have an incentive to compete for security-based swap business based on their ability and willingness to participate in pay to play activity, rather than on their merit or the merit of a proposed transaction, out of concern that they may be overlooked if they fail to make such contributions. However, we believe the incentives for Major SBS Participants to engage in pay to play activity are unlikely to be as strong as the incentives for SBS Dealers given that, by definition, Major SBS Participants are not engaged in security-based swap dealing activity at levels above the *de minimis* threshold.[1125] As such, Major SBS Participants are less likely than SBS Dealers to be acting as dealers in the security-based swap market and, like any other person whose dealing activity does not exceed the dealer *de minimis* thresholds, should therefore be less susceptible to the types of competitive pressures that may create an incentive to participate in pay to play activity. We further note that, if a Major SBS Participant is, in fact, engaged in security-based swap dealing activity above the *de minimis* threshold, it would need to register as an SBS Dealer and, as such, would need to comply with the pay to play rules imposed by Rule 15Fh–6.

Therefore, SBS Dealers, unlike Major SBS Participants, may have an incentive to participate in pay to play practices out of concern that they may be overlooked if they fail to make such contributions which, in turn, would necessitate application of pay to play prohibitions. Furthermore, the exclusion of Major SBS Participants from Rule 15Fh–6 will also be consistent with the pay to play prohibition adopted by the CFTC.[1126] Substantial consistency across pay to play regulatory regimes will be helpful for those entities that have already established a regulatory infrastructure to comply with existing rules. One commenter suggested that, with respect to the proposal that independent representatives be subject to pay to play limitations, an exception is needed "for advisors that are employees of the special entity, given the employer-employee relationship." [1127] However, the Commission notes that the rules already include such an exception. As explained previously, Rule 15Fh–5(a)(1)(vi) as adopted requires an SBS Entity to have a reasonable basis for believing that the independent representative is a person that is subject to rules of the Commission, the CFTC or an SRO subject to the jurisdiction of the Commission or the CFTC prohibiting it from engaging in specified activities if certain political contributions have been made, unless the independent representative is an employee of the special entity.

The same commenter also urged the Commission, in a comment letter dated August 2011, to delay imposing the proposed pay to play rule until after the "dealer" definitions are finalized.[1128] As explained in Section IV.B below, the Commission is adopting a compliance date for final Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 that is the same as the compliance date of the SBS Entity registration rules.[1129]

The Commission declines to revise Rule 15Fh–6, as one commenter suggested, by limiting the triggering event for the application of the pay to play rules to "engag[ing] in municipal security-based swap business" or "the execution of a security-based swap with a municipal entity." [1130] As explained in the Proposing Release, pay to play occurs when persons seeking to do business with municipal entities make political contributions, or are solicited to make political contributions, to elected officials or candidates to influence the selection process.[1131] Hence, pay to play could occur when an SBS Dealer is merely offering to enter into a security-based swap with a municipal entity, before that SBS Dealer has yet to actually enter into, engage in, or execute any such transaction. Rather, the SBS Dealer is seeking to influence the selection process to generate business. Therefore, the Commission believes that further parsing of the trigging event applicable to this rule, as suggested by the commenter, would create an unintended regulatory gap that would not capture those who offer to enter into a security-based swap transaction with a municipal entity with the hope that their contributions or payments will influence the selection process so that they may later enter into, engage in, or execute security-based swaps with that municipal entity. As one court noted,"[w]hile the risk of corruption is obvious and substantial, actors in this field are presumably shrewd enough to structure their relations rather indirectly." [1132] Furthermore, this same suggestion was raised to and declined by the CFTC.[1133] As a result, the triggering event for the application of Rule 15Fh–6 is consistent with the CFTC's rule and substantially consistent with the trigging event for certain prohibitions found in the Commission's Advisers Act Rule 206(4)–5.[1134]

[1120] *See* Advisers Act Pay-to-Play Release, 75 FR at 41051, n.434, *supra* note 1100 (noting, similarly, that the prohibitions in Rule 206(4)–5 also do not apply to contributions made before the compliance date established for Rule 206(4)–5 by new covered associates to which the look back applies).

[1121] *See id.* (providing similar examples in connection with Rule 206(4)–5).

[1122] CFA, *supra* note 5.

[1123] *See, e.g.,* Section II.B (explaining that, unlike the definition of "security-based swap dealer," which focuses on the way a person holds itself out in the market and whose function is to serve as the point of connection in those markets, the definition of "major security-based swap participant," focuses on the market impacts and risks associated with an entity's security-based swap positions).

[1124] *See, e.g.,* MFA, *supra* note 5 (urging the Commission to consider separate regulatory regimes for SBS Dealers and Major SBS Participants, arguing that they are different, and there are "different reasons why the Dodd-Frank Act requires additional oversight of each").

[1125] *See* Exchange Act rule 3a61–1(a)(1) (limiting the definition of "major security-based swap participant" to persons that are not security-based swap dealers).

[1126] *See* CFTC Adopting Release, 77 FR at 9800, *supra* note 21.

[1127] APPA, *supra* note 5.

[1128] APPA, *supra* note 5.

[1129] The Commission explained in the Registration Adopting Release that persons determined to be SBS Dealers or Major SBS Participants under those rules need not register as such until the dates provided for in the Commission's final rules regarding SBS Entity registration requirements, "and will not be subject to the requirements applicable to those dealers and major participants until the dates provided in the applicable final rules." Registration Adopting Release, *supra* note 989.

[1130] FIA/ISDA/SIFMA, *supra* note 5 (suggesting that the Commission consider replacing the proposed "triggering occasion for the application of the rule").

[1131] *See* Proposing Release, 76 FR at 42432, *supra* note 3.

[1132] *Id.* (citing *Blount,* 61 F.3d at 945).

One commenter that addressed the definition of "solicit" in the proposed rule generally urged us to adopt a narrower definition.[1135] However, the Commission declines to revise Rule 15Fh–6 to further parse the definition of "solicit." We believe that it is unnecessary, as the commenter suggested, for the definition to cover only direct communications or to state what communications are *not* covered by the term "solicit." [1136] The proposed definition makes clear that to fall within its scope the communication, whether direct or indirect, must be "with a municipal entity for the purpose of obtaining or retaining an engagement related to a security-based swap." Further parsing and thus narrowing of the definition of "solicit" is unwarranted given the covert and secretive nature of pay to play practices where, as noted above, "actors in this field are presumably shrewd enough to structure their relations rather indirectly." [1137] Rule 15Fh–6 is intended to deter SBS Dealers from participating, even indirectly, in pay to play practices. The Commission believes that the definition of "solicit" is clear as to what communications are covered by the pay to play rule, and the definition is also consistent with the CFTC's rule and the Commission's definition of "solicit" in Advisers Act Rule 206(4)–5 [1138] which, as noted above, Rule 15Fh–6 was modeled on and intended to complement.

Another commenter suggested that the Commission revise Rule 15Fh–6 to create a safe harbor from the pay to play rule for a special entity that is represented by a "qualified independent representative" that affirmatively selects the SBS Dealer.[1139] However, the Commission declines to create a safe harbor as the commenter suggested. For one, the commenter's argument that such a safe harbor would "assist municipal entities and their advisors by preserving their ability to execute security-based swap transactions" is not persuasive to support this suggested modification when, for example, one of the purposes behind this rule is the need for prophylactic measures to address stealthy pay to play practices.[1140] As stated in the Proposing Release and noted above, by its nature, pay to play is covert and secretive because participants do not broadcast that contributions or payments are made or accepted for the purpose of influencing the selection of a financial services provider. The Commission believes that adopting such a safe harbor, as suggested, could create a means for would-be wrongdoers to covertly and secretively engage in pay to play practices by, among other things, using situations where the special entity, represented by a qualified independent representative, selects the SBS Dealer as a way to evade or otherwise circumvent the rule's prohibitions. The commenter's suggestion would also create a material difference between the regulatory regimes established by the Commission under the Advisers Act as well as the CFTC's rules and would decrease regulatory efficiencies for market participants.

Finally, we are not expressly excluding, as one commenter suggested, state-established plans that are managed by a third-party, such as 529 college savings plans, from the pay to play provisions.[1141] We do not find the commenter's unsupported claim that pay to play provisions will deter SBS Dealers from transacting business with such plans persuasive. More importantly, even if we were to accept this argument, the same concerns, outlined above, that we are attempting to address with these pay to play restrictions, including but not limited to the furtive nature of pay to play practices, are also applicable for state-established plans that are managed by a third-party. As noted above, we believe that SBS Dealers may have an incentive to participate in pay to play practices, even in connection with state-established plans that are managed by a third-party, out of concern that they may be overlooked for business if they fail to make such contributions. We further believe these practices may result in significant harm to municipalities and others, including state-established plans, in connection with security-based swap transactions. Rule 15Fh–6(b)(3)(i) is intended to deter SBS Dealers from participating, even indirectly, in such practices.

I. Chief Compliance Officer

Section 15F(k) of the Exchange Act requires an SBS Entity to designate a CCO, and imposes certain duties and responsibilities on that CCO.[1142]

1. Proposed Rule

a. Designation, Reporting Line, Compensation and Removal of the CCO

Proposed Rule 15Fk–1(a) would require an SBS Entity to designate a CCO on its registration form. Proposed Rule 15Fk–1(b)(1) would require that the CCO report directly to the board of directors or to the senior officer of the SBS Entity.[1143] Proposed Rule 15Fk–1(e)(1) would define "board of directors" to include a body performing a function similar to the board of directors. Proposed Rule 15Fk–1(e)(2) would define "senior officer" to mean the chief executive officer or other equivalent officer. Finally, proposed Rule 15Fk–1(d) would require that the compensation and removal of the CCO be approved by a majority of the board of directors of the SBS Entity.

b. Duties of the CCO

Proposed Rule 15Fk–1(b) would impose certain duties on the CCO. Proposed Rule 15Fk–1(b)(2) would require the CCO to review the compliance of the SBS Entity with respect to the requirements in Section 15F of the Exchange Act and the rules and regulations thereunder.[1144] Proposed Rule 15Fk–1(b)(2) would further require that, as part of the CCO's obligation to review compliance by the SBS Entity, the CCO establish, maintain, and review policies and procedures that are reasonably designed to achieve compliance by the SBS Entity with

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[1133] *See* CFTC Adopting Release, 77 FR at 9799–800, *supra* note 21.

[1134] *See* Advisers Act Rule 206(4)–5(2)(ii) (including, among other triggering activities, when the investment adviser is "providing or seeking to provide investment advisory services to a government entity").

[1135] FIA/ISDA/SIFMA, *supra* note 5 (recommending that the Commission clarify the definition of "solicit" include only "any direct communication by any person with a municipal entity for the purpose of obtaining or retaining municipal security-based swap business").

[1136] *See id.* (suggesting that the rule should exclude any communication with a municipal entity for the sole purpose of obtaining or retaining any other type of business covered under pay-to-play restrictions because, in that commenter's view, such communications would already trigger pay-to-play restrictions under other regulations).

[1137] Proposing Release, 76 FR at 42432, *supra* note 3 (citing *Blount*, 61 F.3d at 945).

[1138] 17 CFR 275.206(4)–5(f)(10)(i) (defining "solicit," in part, to mean "to communicate, directly or indirectly, for the purpose of obtaining or retaining a client for . . . an investment adviser").

[1139] SIFMA (August 2011), *supra* note 5.

[1140] *Cf. Blount*, 61 F.3d at 945 (noting that, with respect to pay to play practices "the likelihood of stealth great," while "the legislative purpose prophylactic").

[1141] *See* SIFMA (August 2011), *supra* note 5.

[1142] 15 U.S.C. 78o–10(k).

[1143] *See* Section 15F(k)(2)(A) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(A).

[1144] *See* Section 15F(k)(2)(B) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(B).

Section 15F of the Exchange Act and the rules and regulations thereunder.

Proposed Rule 15Fk–1(b)(3) would require that the CCO, in consultation with the board of directors or the senior officer of the organization, promptly resolve conflicts of interest that may arise.[1145] Under proposed Rule 15Fk–1(b)(4), the CCO would be responsible for administering each policy and procedure that is required to be established pursuant to Section 15F of the Exchange Act and the rules and regulations thereunder.[1146] Proposed Rule 15Fk–1(b)(5) would require the CCO to establish, maintain and review policies and procedures reasonably designed to ensure compliance with the provisions of the Exchange Act and the rules and regulations thereunder relating to the SBS Entity's business as an SBS Entity.[1147] Proposed Rule 15Fk–1(b)(6) would require the CCO to establish, maintain and review policies and procedures reasonably designed to remediate promptly non-compliance issues identified by the CCO through any compliance office review, look-back, internal or external audit finding, self-reporting to the Commission and other appropriate authorities, or complaint that can be validated.[1148] Proposed Rule 15Fk–1(e)(3) would define "complaint that can be validated" to mean any written complaint by a counterparty involving the SBS Entity or an associated person that can be supported upon reasonable investigation. Proposed Rule 15Fk–1(b)(7) would require the CCO to establish and follow procedures reasonably designed for prompt handling, management response, remediation, retesting, and resolution of non-compliance issues.[1149]

c. Annual Compliance Report

Proposed Rule 15Fk–1(c)(1) would require that the CCO annually prepare and sign a report describing the SBS Entity's compliance policies and procedures (including the code of ethics and conflicts of interest policies) and the compliance of the SBS Entity with the Exchange Act and rules and regulations thereunder relating to its business as an SBS Entity.[1150] Proposed Rule 15Fk–1(c)(2) would require that each compliance report also contain, at a minimum, a description of: (1) The SBS Entity's enforcement of its policies and procedures relating to its business as an SBS Entity; (2) any material changes to the policies and procedures since the date of the preceding compliance report; (3) any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SBS Entity to incorporate such recommendation; and (4) any material compliance matters identified since the date of the preceding compliance report. Proposed Rule 15Fk–1(e)(4) would define "material compliance matter" to mean any compliance matter about which the board of directors of the SBS Entity would reasonably need to know to oversee the compliance of the SBS Entity, and that involves, without limitation: (1) A violation of the federal securities laws relating to its business as an SBS Entity by the SBS Entity or its officers, directors, employees or agents; (2) a violation of the policies and procedures of the SBS Entity relating to its business as an SBS Entity by the SBS Entity or its officers, directors, employees or agents; or (3) a weakness in the design or implementation of the policies and procedures of the SBS Entity relating to its business as an SBS Entity.

Proposed Rule 15Fk–1(c)(2)(ii)(D) would require the compliance report to include a certification, under penalty of law, that the compliance report is accurate and complete.[1151] Proposed Rule 15Fk–1(c)(2)(ii)(A) would require that the compliance report accompany each appropriate financial report of the SBS Entity that is required to be furnished or filed with the Commission pursuant to Exchange Act Section 15F and the rules and regulations thereunder.[1152] To allow the compliance report to accompany each appropriate financial report within the required timeframe, proposed Rule 15Fk–1(c)(2)(ii)(B) would require the compliance report to be submitted to the board of directors, the audit committee and the senior officer of the SBS Entity at the earlier of their next scheduled meeting or within 45 days of the date of execution of the certification.

Proposed Rule 15Fk–1(c)(2)(ii)(C) would require the compliance report to include a written representation that the chief executive officer(s) (or equivalent officer(s)) has/have conducted one or more meetings with the CCO in the preceding 12 months, the subject of which addresses the SBS Entity's obligations as set forth in the proposed rules and in Exchange Act Section 15F. The subject of the meeting(s) must include: (1) The matters that are the subject of the compliance report; (2) the SBS Entity's compliance efforts as of the date of such meeting; and (3) significant compliance problems and plans in emerging business areas relating to its business as an SBS Entity.[1153]

Under proposed Rule 15Fk–1(c)(2)(iii), if compliance reports are separately bound from the financial statements, the compliance reports shall be accorded confidential treatment to the extent permitted by law.

2. Comments on the Proposed Rule

a. Designation, Reporting Line, and Compensation and Removal of the CCO

Five commenters addressed the designation, reporting line and compensation and removal of the CCO.[1154] Two commenters argued for greater flexibility for SBS Entities with respect to these requirements.[1155] The first commenter objected to the mandated line of reporting of the CCO in the proposed rule (which would require the CCO to report directly to the board of directors or to the senior officer of the SBS Entity) and recommended allowing SBS Entities greater flexibility in determining the most effective reporting framework in light of their individual structure and circumstances.[1156] The commenter noted that, particularly in large institutions where security-based swap transactions are one of many lines of business, the proposed rule would prohibit the CCO from reporting to other senior management who may be more familiar with the security-based swap activities of the SBS Entity.[1157] Accordingly, the commenter recommended that the Commission define the term "senior officer" to include a more senior officer within the SBS Entity's compliance, risk, legal or other control function as the SBS Entity shall reasonably determine to be appropriate.[1158]

[1145] *See* Section 15F(k)(2)(C) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(C).

[1146] *See* Section 15F(k)(2)(D) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(D).

[1147] *See* Section 15F(k)(2)(E) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(E).

[1148] *See* Section 15F(k)(2)(F) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(F).

[1149] *See* Section 15F(k)(2)(G) of the Exchange Act, 15 U.S.C. 78o–10(k)(2)(G).

[1150] *See* Section 15F(k)(3)(A) of the Exchange Act, 15 U.S.C. 78o–10(k)(3)(A). As noted in the Proposing Release, the Commission believes there is a drafting error in the reference to compliance of the "major swap participant" in Section 15F(k)(3)(A) of the Exchange Act, and accordingly, proposed Rule 15Fk–1(c)(1) would apply the requirement with respect to the compliance of the "major security-based swap participant." *See* Proposing Release, 76 FR at 42436 n.288, *supra* note 3.

[1151] *See* Section 15F(k)(3)(B)(ii) of the Exchange Act, 15 U.S.C. 78o–10(k)(3)(B)(ii).

[1152] *See* Section 15F(k)(3)(B)(i) of the Exchange Act, 15 U.S.C. 78o–10(k)(3)(B)(i).

[1153] *Id.*

[1154] *See* FIA/ISDA/SIFMA, *supra* note 5; CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; Barnard, *supra* note 5; SIFMA (September 2015), *supra* note 5.

[1155] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (September 2015), *supra* note 5.

[1156] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1157] *Id.*

Similarly, the second commenter asked the Commission to provide guidance specifying that if a division of a larger company is an SBS Entity, then the CCO of such entity could report to the senior officer of that division.[1159] Additionally, the commenter requested guidance: (1) Regarding the supervisory liability of compliance and legal personnel employed by SBS Entities that is consistent with the guidance it has issued for broker-dealers' legal and compliance personnel; and (2) clarifying that the CCO may share additional executive responsibilities within the SBS Entity.[1160]

Both commenters objected to the proposed requirement that the compensation and removal of the CCO be approved by a majority of the SBS Entity's board of directors.[1161] The first commenter recommended eliminating the requirement, noting that the provision is not mandated by the Dodd-Frank Act, is not consistent with other requirements applicable to similarly situated employees, and would impose organizational inefficiencies and other unwarranted costs while offering minimal benefits.[1162] The second commenter recommended allowing either the board of directors or the senior officer of the SBS Entity to approve the compensation or removal of the CCO to be consistent with the parallel CFTC requirement, asserting that this change would reasonably ensure the independence and effectiveness of the CCO while providing for greater flexibility.[1163]

Three commenters argued for more stringent requirements with respect to the designation, reporting line and compensation and removal of the CCO.[1164] The first commenter asserted that ensuring market participants have CCOs with real authority and autonomy to police a firm from within is one of the most efficient and effective tools available to regulators, and accordingly, recommended adopting additional measures to protect the authority and independence of CCOs.[1165] Specifically, the commenter suggested: (1) Requiring the CCO to meet competency standards, including a lack of disciplinary history and criteria demonstrating relevant knowledge and experience; (2) prohibiting the CCO from serving as General Counsel or a member of the legal department of the SBS Entity; (3) appointing a senior CCO with overall responsibility for compliance by a group of affiliated or controlled entities; (4) vesting authority in independent board members to oversee the hiring, compensation, and termination of the CCO; (5) requiring the CCO to have direct access to the board; and (6) prohibiting attempts by officers, directors, or employees to coerce, mislead, or otherwise interfere with the CCO.[1166]

Similarly, the second commenter recommended that the authority and responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities, be vested only in the independent directors and not the full board.[1167] Additionally, the commenter suggested that the CCO have only a compliance role and no other role or responsibility that could create conflicts of interest or threaten its independence, and that the CCO's compensation be designed in a way that avoids conflicts of interest.[1168]

The third commenter asserted that firms should not be permitted to allow the CCO to report to a senior officer of the firm as a substitute for reporting to the board.[1169]

b. Duties of the CCO

Three commenters addressed the duties of the CCO.[1170] The first commenter supported the Commission's approach in the proposal regarding the role and responsibilities of the CCO, but recommended the following modifications: (1) Changing the phrase "ensure compliance" in proposed Rule 15Fk–1(b)(5) to "achieve compliance," (2) confirming that the relevant conflicts of interest under proposed Rule 15Fk–1(b)(3) would be those which are reasonably identified by the SBS Entity's policies and procedures, taking into consideration the nature of the SBS Entity's business, and (3) clarifying that a CCO's responsibility under proposed Rule 15Fk–1(b)(4) to "administer" a firm's policies and procedures is limited to coordinating supervisors' administration of the relevant policies and procedures.[1171]

The second commenter recommended harmonizing the Commission's CCO requirements with FINRA Rule 3130 and the CFTC's CCO requirements for Swap Entities to enable SBS Entities that are also broker-dealers and/or Swap Entities to make use of their existing infrastructure and to minimize confusion.[1172] Specifically, the commenter recommended a number of changes to proposed Rule 15Fk–1(b) to align the description of the duties of an SBS Entity's CCO with those of a broker-dealer CCO, as described in applicable FINRA and SEC guidance, and guidance in the Proposing Release regarding the supervisory responsibilities of an SBS Entity's CCO.[1173] In particular, the commenter sought clarification that the SBS Entity has the responsibility, and not the CCO in his or her personal capacity, to establish, maintain and review required policies and procedures.[1174] The recommended changes include: (1) Replacing the requirement in proposed Rule 15Fk–1(b)(2) to "establish, maintain and review" written policies and procedures reasonably designed to achieve compliance with Section 15F of the Act and the rules and regulations thereunder with a requirement to "prepare the registrant's annual assessment of" such policies and procedures; (2) qualifying the requirement in proposed Rule 15Fk–1(b)(3) to promptly resolve conflicts of interest in consultation with the board of directors or the senior officer of the SBS Entity with the qualifying language "take reasonable steps to" resolve; (3) clarifying that the requirement in proposed Rule 15Fk–1(b)(4) to administer required policies and procedures involves "advising on the development of, and reviewing, the registrant's processes for (i) modifying those policies and procedures as business, regulatory and legislative changes and events dictate, (ii) evidencing supervision by the personnel responsible for the execution of those policies and procedures, and (iii) testing the registrant's compliance with those policies and procedures;" (4) qualifying the requirements in proposed Rules 15Fk–1(b)(5)–(7) to establish, maintain and review certain policies and procedures with the qualifying language "take reasonable steps to ensure that the registrant" establishes, maintains and reviews such policies and procedures; and (5) eliminating the timing requirements in proposed Rules 15Fk–1(b)(6) and (7) that the CCO "promptly" take the required actions.[1175] Finally, the commenter requested that the Commission provide guidance explaining that resolution of a conflict of interest encompasses both elimination and mitigation of the conflict, and that the CCO's role in resolving conflicts may involve actions other than making the ultimate decision with regard to such conflict.[1176]

[1158] *Id.*

[1159] *See* SIFMA (September 2015), *supra* note 5.

[1160] *Id.*

[1161] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (September 2015), *supra* note 5.

[1162] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1163] *See* SIFMA (September 2015), *supra* note 5.

[1164] *See* CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; Barnard, *supra* note 5.

[1165] *See* Better Markets (October 2013), *supra* note 5.

[1166] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5.

[1167] *See* Barnard, *supra* note 5.

[1168] *Id.*

[1169] *See* CFA, *supra* note 5.

[1170] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (September 2015), *supra* note 5; CFA, *supra* note 5.

[1171] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1172] *See* SIFMA (September 2015), *supra* note 5.

[1173] *Id.*

[1174] *Id.*

In contrast, the third commenter recommended mandating that CCOs have greater authority to resolve and mitigate conflicts of interest that may cause compliance problems.[1177] At a minimum, the commenter suggested requiring the CCO to highlight in the compliance report any recommendations it made with regard to resolution or mitigation of conflicts of interest that were not adopted.[1178]

c. Annual Compliance Report

Four commenters addressed the annual compliance report requirements.[1179] One commenter noted several concerns with the annual compliance report requirement.[1180] First, the commenter requested that the Commission permit the consolidation of annual compliance reporting requirements for SBS Entities under common control (including those that are also registered broker-dealers) to avoid forcing a consolidated financial institution to submit separate compliance reports for each SBS Entity and broker-dealer within the corporate structure.[1181] Second, the commenter expressed concern regarding the requirement in proposed Rule 15Fk–1(c)(1)(i) that the compliance report contain a description of the compliance of the SBS Entity, as well as a description of the SBS Entity's compliance policies and procedures, as required under proposed Rule 15Fk–1(c)(1)(ii).[1182] The commenter requested that the Commission clarify that proposed Rule 15Fk–1(c)(1)(i) would be satisfied by a description of the particular matters set forth in proposed Rule 15Fk–1(c)(2)(i), noting that a requirement to describe an SBS Entity's "compliance" in an absolute sense is so broad and so vague as to be incapable of being fulfilled in practice.[1183] Third, the commenter recommended that the Commission amend its Freedom of Information Act regulations in a manner consistent with proposed Rule 15Fk–1(c)(2)(iii), which would provide that compliance reports bound separately from financial statements shall be accorded confidential treatment to the extent permitted by law.[1184]

The commenter also had several concerns regarding the required certification of the compliance report in proposed Rule 15Fk–1(c)(2)(ii)(D).[1185] The commenter noted that the Dodd-Frank Act does not explicitly require the CCO to be the individual responsible for certifying the compliance report and recommended that the CEO or other relevant senior officer, not the CCO, be responsible for the certification.[1186] Alternatively, if the CCO is required to certify, the commenter requested that the CEO also be required to do so.[1187] Additionally, the commenter requested that the Commission clarify that the liability standard for the certification is the same as that which applies to other documents filed with the Commission, including liability under Section 32 of the Exchange Act for willfully and knowingly making false or misleading material statements or omissions to the Commission.[1188] The commenter also asserted that the certifier should, as in other contexts, be responsible solely for stating that the documents were prepared under his or her direction or supervision in accordance with a system designed to ensure that qualified personnel would properly gather and evaluate the documents, and that based on his or her inquiry of those persons who were responsible for gathering the documents, to the best of his or her knowledge, the documents are accurate in all material respects.[1189]

Similarly, the second commenter requested that the Commission provide guidance clarifying that if a certifying officer has complied in good faith with policies and procedures reasonably designed to confirm the accuracy and completeness of annual compliance report, both the SBS Entity and the certifying officer would have a basis for defending accusations of false, incomplete, or misleading statements or representations made in the report.[1190] The commenter also requested a number of changes to the annual compliance report requirements in proposed Rule 15Fk–1(c) to harmonize them with the CFTC's parallel requirements.[1191] The commenter argued that alignment of the content requirements for annual compliance reports "would allow SBS Entities to leverage the extensive and rigorous procedures they have adopted to comply with the CFTC CCO Rule and related guidance." [1192] Specifically, the recommended changes include: (1) Eliminating the proposed requirement to include a "description of compliance" in the annual compliance report, asserting that this requirement would add unnecessary ambiguity; (2) specifying that the report need only contain a description of the "written" compliance policies and procedures of the SBS Entity; (3) changing the proposed description requirement in proposed Rule 15Fk–1(c)(2)(i)(A) from "enforcement" of the SBS Entity's policies and procedures to an "assessment of the effectiveness" of such policies and procedures; (4) specifying that the requirement to describe material changes to policies and procedures in proposed Rule 15Fk–1(c)(2)(i)(B) refers to the "registrant's" policies and procedures; (5) changing the proposed description requirement in proposed Rule 15Fk–1(c)(2)(i)(C) from "any recommendation for material changes to the policies and procedures" to "areas for improvement, and recommended potential or prospective changes or improvements to its compliance program and resources devoted to compliance;" (6) changing the proposed description requirement in proposed Rule 15F–1(c)(2)(i)(D) from "any material compliance matters" to "any material non-compliance matters" identified since the date of the preceding report (and eliminating the definition of material compliance matter); (7) aligning the deadline for filing of the compliance report with the CFTC's 90 day deadline; (8) allowing for submission of the compliance report to either the board of directors or the senior officer, as opposed to requiring submission to both the board of directors (and audit committee) and the senior officer, as proposed; (9) eliminating the proposed requirement that the report contain a written representation regarding the required annual meeting between the CEO and the CCO; (10) eliminating the proposed specifications for what topics such meeting must cover; (11) allowing either the CCO or the senior officer to certify the annual compliance report to the best of his or her knowledge; and (12) providing for amendments to, extensions of filing deadlines for, and incorporation of other reports by reference in the annual compliance report.[1193]

[1175] *Id.*

[1176] *Id.*

[1177] *See* CFA, *supra* note 5.

[1178] *Id.*

[1179] *See* FIA/ISDA/SIFMA, *supra* note 5; CFA, *supra* note 5; Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; SIFMA (September 2015), *supra* note 5.

[1180] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1181] *Id.*

[1182] *Id.*

[1183] *Id.*

[1184] *Id.*

[1185] *Id.*

[1186] *Id.*

[1187] *Id.*

[1188] *Id.*

[1189] *Id.*

[1190] *See* SIFMA (September 2015), *supra* note 5.

[1191] *Id.*

[1192] *Id.*

The third commenter suggested: (1) Requiring the CCO to meet quarterly with the Audit Committee in addition to annual meetings with the board of directors and senior management; and (2) requiring the board to review and comment on, but not edit, the compliance report.[1194] Similarly, the fourth commenter expressed support for requiring the audit committee to review and the CCO to certify the compliance report, and argued that the CCO should not be permitted to qualify its report.[1195]

3. Response to Comments and Final Rule

Rule 15Fk–1, as adopted, is designed to be generally consistent with the current compliance obligations applicable to CCOs of other Commission-regulated entities,[1196] as well as with the CFTC's CCO rules applicable to Swap Entities. As noted in the Proposing Release, the requirements of Rule 15Fk–1 underscore the central role that sound compliance programs play to help ensure compliance with the Exchange Act and rules and regulations thereunder applicable to security-based swaps.[1197] The Commission believes that these requirements will help foster sound compliance programs.[1198]

a. Designation, Reporting Line, and Compensation and Removal of the CCO

After considering the comments, the Commission is adopting Rule 15Fk–1(a) (designation of the CCO), Rule 15Fk–1(b)(1) (reporting line of the CCO), Rule 15Fk–1(d) (compensation and removal of the CCO), and the associated definitions of "board of directors" and "senior officer" in Rule 15Fk–1(e)(1) and (2) as proposed. To address concerns that an SBS Entity's commercial interests might have undue influence on a CCO's ability to make forthright disclosure to the board of directors or the senior officer about any compliance failures, the rule is designed to help promote CCO independence and effectiveness by establishing a direct reporting line to the board or senior officer, and by requiring compensation and removal decisions to be made by a majority of the board of directors. Accordingly, Rule 15Fk–1(b)(1) requires the CCO to report directly to the board or senior officer of the SBS Entity.[1199] In addition, pursuant to Rule 15Fk–1(d) any decision to remove the CCO from his or her responsibilities or approve his or her compensation must be made by a majority of the board. The Commission is not eliminating the requirement that only a majority of the board can approve the compensation or removal of the CCO, as suggested by one commenter,[1200] nor is the Commission broadening the rule to allow an SBS Entity's senior officer to approve the compensation and removal of the CCO, as suggested by another commenter.[1201] The Commission believes that eliminating the requirement that only a majority of the board can approve the compensation or removal of the CCO, or allowing an SBS Entity's senior officer to approve the compensation and removal of the CCO could undermine the CCO's independence and effectiveness, particularly if the CCO is responsible for reviewing the senior officer's compliance with the Exchange Act and the rules and regulations thereunder.[1202]

In promoting a CCO's independence and effectiveness, the Commission does not believe that it is necessary to adopt additional requirements suggested by commenters prohibiting a CCO from having additional roles or responsibilities outside of compliance, such as being a member of the SBS Entity's legal department or from serving as the SBS Entity's general counsel.[1203] To the extent that this poses a potential or existing conflict of interest, the Commission believes that an SBS Entity's written policies and procedures can be designed to adequately identify and mitigate any such conflict.[1204]

The Commission also is not adopting rules requiring independent board members to oversee the hiring, compensation and termination of the

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[1193] *Id.*

[1194] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5.

[1195] *See* CFA, *supra* note 5.

[1196] *See, e.g.,* FINRA Rule 3130; Rule 38a–1(a) under the Investment Company Act of 1940, 17 CFR 270.38a–1(a)(1); Rule 206(4)–7(a) under the Advisers Act, 17 CFR 275.206(4)–7(a); Rule 13n–11 under the Exchange Act, 17 CFR 240.13n–11.

[1197] *See* Proposing Release, 76 FR at 42435, *supra* note 3.

[1198] *See* Exchange Act Sections 15F(h)(1)(B) (authorizing the Commission to prescribe duties for diligent supervision), and 15F(h)(3)(D) (providing authority to prescribe business conduct standards). 15 U.S.C. 78o–10(h)(1)(B) and 78o–10(h)(3)(D).

[1199] One commenter recommended that the Commission define the term "senior officer" to include a more senior officer within the SBS Entity's compliance, risk, legal or other control function as the SBS Entity shall reasonably determine to be appropriate. *See* FIA/ISDA/SIFMA, *supra* note 5. The Commission declines to make this change because it could potentially undercut the independence of the CCO, and as noted above, the Commission believes it is important for the CCO to be independent to mitigate potential conflicts for the CCO in reporting or addressing compliance failures. Another commenter requested that the Commission provide guidance specifying that if a division of a larger company is an SBS Entity, then the CCO of such entity could report to the senior officer of that division. *See* SIFMA (September 2015), *supra* note 5. The Commission has not yet addressed a process through which firms could submit an application for limited designation as an SBS Entity, such as for a division within a larger company. *See* Registration Adopting Release, 80 FR at 48966 n.13, *supra* note 989 (addressing limited designation and registration).

[1200] *See* SIFMA (September 2015), *supra* note 5.

[1201] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1202] This is consistent with the position the Commission took in adopting CCO requirements for security-based swap data repositories ("SDRs"). *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438, 14507 (Mar. 19, 2015) ("SDR Registration Release") ("The Commission is not extending the applicability of this rule to an SDR's senior officer because the Commission believes that this may unnecessarily create conflicts of interest for the CCO, particularly if the CCO is subsequently responsible for reviewing the senior officer's compliance with the Exchange Act and the rules and regulations thereunder."). The Commission also declines to narrow the reporting line requirement to specify that the CCO must report only to the board of directors (and not the senior officer), as suggested by one commenter. *See* CFA, *supra* note 5. Exchange Act Section 15F(k)(2)(A) gives SBS Entities the flexibility of allowing the CCO to report to either the board or senior officer, and the Commission believes that requiring a majority of the board to approve the compensation or removal of the CCO is sufficient to promote the independence of the CCO, allowing for greater flexibility in the reporting line.

[1203] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; Barnard, *supra* note 5. *Cf.* SIFMA (September 2015), *supra* note 5 (requesting clarification that the CCO may share additional executive responsibilities within the SBS Entity). The Commission is also not adopting a commenter's suggestion to require the appointment of a senior CCO with overall responsibility for compliance by a group of affiliated or controlled entities. *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5. The Commission believes entities should have the flexibility to design their organizational structure to meet their business needs.

[1204] As discussed in Section II.G.6, *supra,* Rule 15Fh–3(h)(2)(iii)(H) requires SBS Entities to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the supervisory system from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised. This is consistent with the position the Commission took in adopting CCO requirements for SDRs. *See* SDR Registration Release, 80 FR at 14507, *supra* note 1202 ("In promoting a CCO's independence and effectiveness, the Commission does not believe that it is necessary to adopt, as two commenters suggested, a rule prohibiting a CCO from being a member of the SDR's legal department or from serving as the SDR's general counsel. To the extent that this poses a potential or existing conflict of interest, the Commission believes that an SDR's written policies and procedures can be designed to adequately identify and mitigate any associated costs.").

CCO or any material changes to the CCO's duties, requiring the CCO to have direct access to the board, or expressly prohibiting attempts by officers, directors, or employees to coerce, mislead or otherwise interfere with the CCO, as suggested by commenters.[1205] The Commission continues to believe that requiring a majority of the board to approve the compensation and removal of the CCO is appropriate to promote the CCO's independence and effectiveness, and believes that it is appropriate not to provide for additional requirements such as those suggested by the commenters.[1206] With this approach, the Commission intends to promote the independence and effectiveness of the CCO while also providing SBS Entities flexibility in structuring their businesses and directing their compliance resources.

One commenter suggested requiring the CCO to meet certain competency standards, including criteria demonstrating relevant knowledge and experience.[1207] Given the critical role that a CCO is intended to play in helping to ensure an SBS Entity's compliance with the Exchange Act and the rules and regulations thereunder, the Commission believes that an SBS Entity's CCO generally should be competent and knowledgeable regarding the federal securities laws, empowered with full responsibility and authority to develop appropriate policies and procedures for the SBS Entity, as necessary, and responsible for monitoring compliance with the SBS Entity's policies and procedures adopted pursuant to rules under the Exchange Act.[1208] However, we believe that such considerations are properly vested in the SBS Entity, based on the particulars of its business, and thus, the Commission is not adopting specific requirements concerning the background, training or business experience for a CCO.

Another commenter asked that the Commission provide guidance regarding the supervisory liability of compliance and legal personnel employed by SBS Entities to reflect the guidance Commission staff has issued for broker-dealers' legal and compliance personnel.[1209] The Commission recognizes that compliance and legal personnel play a critical role in efforts by regulated entities to develop and implement effective compliance systems, including by providing advice and counsel to business line personnel. As noted in the Proposing Release, the title of CCO does not, in and of itself, carry supervisory responsibilities, and a CCO does not become a "supervisor" solely because he or she has provided advice or counsel concerning compliance or legal issues to business line personnel, or assisted in the remediation of an issue. Consistent with current industry practice, the Commission generally would not expect a CCO appointed in accordance with Rule 15Fk–1 to have supervisory responsibilities outside of the compliance department.[1210] Accordingly, absent facts and circumstances that establish otherwise, the Commission generally would not expect that a CCO would be subject to a sanction by the Commission for failure to supervise other SBS Entity personnel.[1211] Moreover, a CCO with supervisory responsibilities could rely on the provisions of Rule 15Fh–3(h)(3), under which a person associated with an SBS Entity shall not be deemed to have failed to reasonably supervise another person if the conditions in the rule are met.[1212] The fact that the Exchange Act does not presume that compliance or legal personnel are supervisors solely because of their compliance or legal functions does not in any way diminish the compliance duties of the CCO pursuant to Rule 15Fk–1(b), as discussed below.

b. Duties of the CCO

After considering the comments, the Commission is adopting Rule 15Fk–1(b)(2)–(4) (duties of the CCO) with a number of modifications. In response to a commenter's concerns,[1213] the modifications (discussed below) are primarily intended to provide certainty regarding the CCO's duties under the final rule, consistent with the duties in FINRA Rule 3130 and the CFTC's CCO requirements for Swap Entities, and to clarify the role of the CCO generally. To the extent our requirements are consistent with FINRA and/or CFTC standards, this consistency should result in efficiencies for SBS Entities that have already established infrastructure to comply with the FINRA and/or CFTC standards. Consistent wording regarding expectations for CCOs will also allow such SBS Entities to more easily analyze compliance with the Commission's rule against their existing activities to comply with FINRA Rule 3130 and the CFTC's CCO rule for Swap Entities.

First, we are reorganizing Rule 15Fk–1(b)(2) to provide additional clarity and certainty as to the obligations of the CCO. Specifically, our modifications are designed to make clear that in taking reasonable steps to ensure that the SBS Entity establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity, the CCO must satisfy the three specific obligations enumerated in Rule 15Fk–1(b)(2)(i)–(iii), discussed below.

Second, in addition to the reorganization described above, we are making some changes to the descriptions of the duties listed in Rule 15Fk–1(b)(2). As described above, we are making changes to the duty that now appears in Rule 15Fk–1(b)(2). Specifically, the Commission agrees with a commenter that it is the responsibility of the SBS Entity, not the CCO in his or her personal capacity, to establish and enforce required policies and procedures.[1214] Accordingly, to reflect that, the Commission is qualifying the proposed requirement to establish, maintain and review policies and procedures reasonably designed to ensure compliance with the Exchange Act and rules and regulations thereunder with the qualifying language

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[1205] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; Barnard, *supra* note 5.

[1206] The Commission also believes that requiring a majority of the board to approve the compensation of the CCO will address a commenter's concern regarding designing the compensation of the CCO in a way that avoids conflicts of interest. *See* Barnard, *supra* note 5.

[1207] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5.

[1208] This is generally consistent with the position the Commission took in adopting CCO requirements for SDRs. *See* SDR Registration Release, 80 FR at 14510, *supra* note 1202 ("Given the critical role that a CCO is intended to play in ensuring an SDR's compliance with the Exchange Act and the rules and regulations thereunder, the Commission believes that an SDR's CCO should be competent and knowledgeable regarding the federal securities laws, should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR, as necessary, and should be responsible for monitoring compliance with the SDR's policies and procedures adopted pursuant to rules under the Exchange Act. However, the Commission will not substantively review a CCO's competency, and is not requiring any particular level of competency or business experience for a CCO.").

[1209] *See* SIFMA (September 2015), *supra* note 5 (referencing Division of Trading and Markets Frequently Asked Questions about Liability of Compliance and Legal Personnel at Broker-Dealers under Sections 15(b)(4) and 15(b)(6) of the Exchange Act (Sept. 30, 2013), available at: *http://www.sec.gov/divisions/marketreg/faq-cco-supervision-093013.htm*).

[1210] *See* Proposing Release, 76 FR at 42436, *supra* note 3.

[1211] *Id.* Regardless of their status as supervisors, compliance and legal personnel who otherwise violate the federal securities laws or aid and abet or cause a violation may independently be held liable for such violations.

[1212] *See* Proposing Release, 76 FR at 42436, *supra* note 3.

[1213] *See* SIFMA (September 2015), *supra* note 5.

[1214] *See* SIFMA (September 2015), *supra* note 5.

"take reasonable steps to ensure that the registrant" establishes, maintains and reviews such policies and procedures. The Commission is also changing the requirement in Rule 15Fk–1(b)(2) from a requirement to "ensure compliance" to a requirement to "achieve compliance" with the Exchange Act and rules and regulations thereunder relating to the SBS Entity's business as an SBS Entity in response to a specific suggestion from a commenter,[1215] and adding the word "written" before policies and procedures to clarify that the policies and procedures required by the rule must be written. Similar to the qualifying language with respect to the registrant's policies and procedures, the Commission is making the change from "ensure compliance" to "achieve compliance" to clarify that it is not the role of the CCO to "ensure" compliance. The Commission believes the formulation "take reasonable steps to ensure that the registrant establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance" (as opposed to the proposed formulation of "establish, maintain and review policies and procedures reasonably designed to ensure compliance") more appropriately describes the CCO's role. The Commission also notes that the policies and procedures referred to in Rule 15Fk–1(b)(2) include those required by Rules 15Fh–3(h)(2)(iii), 15Fk–1(b)(2)(ii) and 15Fk–1(b)(2)(iii), and any other policies and procedures the SBS Entity deems necessary to achieve compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity.

We are also modifying the three specific obligations of the CCO now enumerated in Rule 15Fk–1(b)(2)(i)–(iii) that the CCO must perform to satisfy his or her duty to take reasonable steps to ensure that the registrant establishes, maintains and reviews policies and procedures reasonably designed to achieve compliance. As adopted, Rule 15Fk–1(b)(2)(i) requires the CCO to "revie[w] the compliance of the [SBS Entity] with respect to the [SBS Entity] requirements described in [S]ection 15F of the [Exchange Act], and the rules and regulations thereunder, where the review shall involve preparing the registrant's annual assessment of its written policies and procedures reasonably designed to achieve compliance with [S]ection 15F of the [Exchange Act] and the rules and regulations thereunder, by the [SBS Entity]." The requirement that the CCO "prepare the registrant's annual assessment of its" written policies and procedures reasonably designed to achieve compliance with Section 15F of the Exchange Act and the rules and regulations thereunder represents a change from the proposed requirement that the CCO "establish, maintain and review" such policies and procedures. We are making this change in response to a specific suggestion from a commenter.[1216] As discussed above, the Commission agrees with the commenter that it is the responsibility of the SBS Entity, not the CCO in his or her personal capacity, to establish and enforce required policies and procedures, and believes that this change clarifies that point.

As adopted, Rule 15Fk–1(b)(2)(ii) requires the CCO to "tak[e] reasonable steps to ensure that the registrant establishes, maintains and reviews policies and procedures reasonably designed to remediate non-compliance issues identified by the [CCO] through any means, including any: (A) Compliance office review; (B) Look-back; (C) Internal or external audit finding; (D) Self-reporting to the Commission and other appropriate authorities; or (E) Complaint that can be validated." This represents a change from the proposed requirements: (1) That the CCO "establish, maintain and review" such policies and procedures, and (2) that such policies and procedures be reasonably designed to remediate "promptly" non-compliance issues. Additionally, as adopted, Rule 15Fk–1(b)(2)(iii) requires the CCO to "tak[e] reasonable steps to ensure that the registrant establishes and follows procedures reasonably designed for the handling, management response, remediation, retesting, and resolution of non-compliance issues." This also represents a change from the proposed requirements: (1) That the CCO "establish and follow" such procedures, and (2) that such procedures be reasonably designed for the "prompt" handling, management response, remediation, retesting, and resolution of non-compliance issues." We are making these changes in response to specific suggestions from a commenter.[1217] As discussed above, the Commission agrees with the commenter that it is the responsibility of the SBS Entity, not the CCO in his or her personal capacity, to establish and enforce required policies and procedures, and believes that the first change to each provision clarifies that point. Additionally, as discussed above, eliminating the proposed timing requirements with respect to the "prompt" remediation and handling of non-compliance issues provides greater consistency with the parallel CFTC requirements. With this change, the Commission intends to focus the CCO's efforts on the effective remediation and handling of non-compliance issues, without placing undue emphasis on speed at the expense of other factors. We believe, however, that the remediation and handling of non-compliance issues generally should occur within a reasonable timeframe.

In addition to the changes described above, the Commission is making one more modification to the duty to remediate non-compliance issues in final Rule 15Fk–1(b)(2)(ii). The proposed rule referred only to non-compliance issues "identified by the [CCO] through any: (A) Compliance office review; (B) Look-back; (C) Internal or external audit finding; (D) Self-reporting to the Commission and other appropriate authorities; or (E) Complaint that can be validated." However, as noted above, Rule 15Fk–1(b)(2)(iii) requires that the CCO "tak[e] reasonable steps to ensure that the registrant establishes and follows procedures reasonably designed for the handling, management response, *remediation,* retesting, and resolution of non-compliance issues" (emphasis added). Because this requirement is not limited to non-compliance issues identified by the CCO through a specific means, the Commission believes it is appropriate to clarify that final Rule 15Fk–1(b)(2)(ii) covers non-compliance issues identified by the CCO through any means, including the means specifically listed in sub-paragraphs (A)–(E) of the rule.

Third, the Commission is modifying the duties of the CCO now enumerated in Rules 15Fk–1(b)(3) and (4). As adopted, Rule 15Fk–1(b)(3) requires the CCO to "[i]n consultation with the board of directors or the senior officer of the [SBS Entity], take reasonable steps to resolve any material conflicts of interest that may arise." This represents a change from the proposed requirement, which would have required the CCO to "[i]n consultation with the board of directors or the senior officer of the [SBS Entity], promptly resolve any conflicts of interest that may arise." The Commission is adding the "take reasonable steps" language and materiality qualifier to further clarify and qualify the role of the CCO in resolving conflicts of interest in response to concerns raised by commenters.[1218] Such conflicts of interest could include conflicts between the commercial interests of an SBS Entity and its statutory and regulatory responsibilities, and conflicts between, among, or with associated persons of the SBS Entity. As noted in the Proposing Release and consistent with the discussions of the CCO's role above, the Commission understands that the primary responsibility for the resolution of conflicts generally lies with the business units within SBS Entities because the business line personnel are those with the power to make decisions regarding the business of the SBS Entity.[1219] As a result, the Commission anticipates that the CCO's role with respect to such resolution and mitigation of conflicts of interest would include the recommendation of one or more actions, as well as the appropriate escalation and reporting with respect to any issues related to the proposed resolution of potential or actual conflicts of interest, rather than responsibility to execute the business actions that may be associated with the ultimate resolution of such conflicts. Furthermore, the Commission recognizes that a CCO typically will not exercise the supervisory authority to resolve conflicts of interest, and the revisions to the rule are intended to clarify that CCOs are not required to actually resolve such conflicts.[1220] Finally, in response to a specific suggestion made by a commenter,[1221] the Commission is eliminating the proposed timing requirement with respect to the "prompt" resolution of conflicts of interest to harmonize with the parallel CFTC requirement. With this change, the Commission intends to focus the CCO's efforts on the effective resolution of conflicts of interest, without placing undue emphasis on speed at the expense of other factors. We believe, however, that the resolution of conflicts of interest generally should occur within a reasonable timeframe.

[1215] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1216] *See* SIFMA (September 2015), *supra* note 5.

[1217] *See* SIFMA (September 2015), *supra* note 5.

[1218] *See* FIA/ISDA/SIFMA, *supra* note 5 (requesting confirmation that the relevant conflicts

As adopted, Rule 15Fk–1(b)(4) requires the CCO to "[a]dminister each policy and procedure that is required to be established pursuant to [S]ection 15F of the [Exchange Act] and the rules and regulations thereunder." This represents a change from the proposed requirement that the CCO "be responsible for" administering such policies and procedures. The Commission is eliminating the words "be responsible for" because we believe they are unnecessary and could cause confusion. The CCO is responsible for complying with all of the duties listed in Rule 15Fk–1(b)(2)–(4). Commenters requested clarifications as to what the CCO's administration of the required policies and procedures would entail.[1222] The Commission recognizes that the CCO cannot be a guarantor of the SBS Entity's conduct. The Commission believes that such administration generally should involve: (1) Reviewing, evaluating, and advising the SBS Entity and its risk management and compliance personnel on the development, implementation and monitoring of the policies and procedures of the SBS Entity, including procedures reasonably designed for the handling, management response, remediation, retesting and resolution of non-compliance issues as required by Rule 15Fk–1(b)(2)(iii); and (2) reviewing, evaluating, following and reasonably responding to the development, implementation and monitoring of the SBS Entity's processes for (a) modifying its policies and procedures as business, regulatory and legislative changes dictate; (b) evidencing supervision by the personnel responsible for the execution of its policies and procedures; (c) testing the SBS Entity's compliance with, and the adequacy of, its policies and procedures; and (d) resolving, escalating and reporting issues or concerns. In carrying out this administration, the Commission believes that the CCO generally should consult, as appropriate, with business lines, management and independent review groups regarding resolution of compliance issues.

c. Annual Compliance Report

After considering the comments, the Commission is adopting Rule 15Fk–1(c) (annual compliance report) with a number of modifications, as discussed below. In response to concerns raised by a commenter,[1223] these changes are primarily intended to harmonize the annual compliance report requirements with the CFTC's parallel requirements. As discussed above, this consistency will result in efficiencies for SBS Entities that have already established infrastructure to comply with the CFTC requirements. Consistent wording regarding expectations for the annual compliance report will also allow such SBS Entities to more easily analyze compliance with the Commission's rule against their existing activities to comply with the CFTC's parallel rule for Swap Entities.

First, the Commission is making a clarifying change to Rule 15Fk–1(c)(1) to consistently refer to the annual report required by Rule 15Fk–1(c) as the "compliance report." This wording change will not alter the substantive requirements of the rule. It is only meant to clarify that the rule refers to a single annual compliance report. Second, the Commission is eliminating the proposed requirement to include a description of "the compliance" of the SBS Entity in the annual compliance report in response to concerns raised by commenters,[1224] and specifying that the requirement to include a description of the compliance policies and procedures only requires a description of the "written" compliance policies and procedures of the SBS Entity pursuant to Rule 15Fk–1(c)(1), in response to a specific suggestion from a commenter.[1225] The Commission agrees

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of interest under proposed Rule 15Fk–1(b)(3) would be those which are reasonably identified by the SBS Entity's policies and procedures, taking into consideration the nature of the SBS Entity's business); SIFMA (September 2015), *supra* note 5 (recommending qualifying the requirement to promptly resolve conflicts of interest in consultation with the board or senior officer with the qualifying language "take reasonable steps to" resolve, and requesting guidance explaining that resolution of a conflict of interest encompasses both elimination and mitigation of the conflict and that the CCO's role in resolving conflicts may involve actions other than making the ultimate decision with regard to such conflict).

[1219] *See* Proposing Release, 76 FR at 42436, *supra* note 3.

[1220] This is consistent with the position the Commission took in adopting a similar requirement for CCOs of SDRs. *See* SDR Registration Release, 80 FR at 14510, *supra* note 1202. The Commission is not, as suggested by one commenter, expressly requiring the CCO to highlight in the annual compliance report any recommendations he or she made with regard to resolution or mitigation of conflicts of interest that were not adopted. *See* CFA, *supra* note 5. The Commission believes the requirement in Rule 15Fk–1(c)(2)(i)(C) to include a description in the annual compliance report of areas for improvement, and recommended potential or prospective changes or improvements to its compliance program and resources, as discussed below, will adequately cover such issues. The requirement is broadly framed and will allow the CCO the flexibility to include in the annual compliance report a description of any areas where the CCO thinks the compliance program needs to be improved, including, as appropriate, any recommendations the CCO made with regard to the resolution or mitigation of conflicts of interest that have not yet been adopted.

[1221] *See* SIFMA (September 2015), *supra* note 5.

[1222] *See* SIFMA (September 2015), *supra* note 5 (requesting the addition of rule text explaining that "such administration shall involve advising on the development of, and reviewing, the registrant's processes for (i) modifying those policies and procedures as business, regulatory and legislative changes and events dictate, (ii) evidencing supervision by the personnel responsible for the execution of those policies and procedures, and (iii) testing the registrant's compliance with those policies and procedures"); FIA/ISDA/SIFMA, *supra* note 5 (requesting clarification that a CCO's responsibility to administer a firm's policies and procedures is limited to coordinating supervisors' administration of the relevant policies and procedures).

[1223] *See* SIFMA (September 2015), *supra* note 5.

[1224] *See* SIFMA (September 2015), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5.

[1225] *See* SIFMA (September 2015), *supra* note 5. *Cf.* Commodity Exchange Act Rule 3.3(e)(1) ("The

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with commenters that the proposed requirement to describe "the compliance" of the SBS Entity was vague and believes these clarifying changes will facilitate SBS Entities' compliance with the rule, which will still require an SBS Entity to provide information demonstrating how the SBS Entity complies with the applicable requirements of the Exchange Act and the rules and regulations thereunder in the form of the SBS Entity's written compliances policies and procedures. As adopted, Rule 15Fk–1(c)(1) requires the CCO to "annually prepare and sign a compliance report that contains a description of the written policies and procedures of the [SBS Entity] described in paragraph (b) (including the code of ethics and conflict of interest policies)." The Commission believes that SBS Entities can fulfill this requirement by either providing copies or summaries of their written compliance policies and procedures in the annual compliance report. These changes will also harmonize the annual compliance report requirements with the CFTC's parallel requirements, as discussed above.

The Commission is also making certain modifications to the required content of the annual compliance report in Rule 15Fk–1(c)(2) in response to specific suggestions from a commenter.[1226] First, the Commission is specifying that the requirement to describe material changes to policies and procedures since the date of the preceding compliance report in Rule 15Fk–1(c)(2)(i)(B) refers to the "registrant's" policies and procedures. This is a clarification and does not change the substance of the requirement. The phrase "since the date of the preceding compliance report" in the rule refers to the coverage date of the prior year's compliance report, not the date on which it was prepared. Accordingly, pursuant to Rule 15Fk–1(c)(2)(i)(B), as adopted, an SBS Entity must describe in its annual compliance report any material changes to the SBS Entity's policies and procedures for the time period covered by the report.

Second, the Commission is making a number of changes to harmonize the content requirements for the annual compliance report with the CFTC's parallel requirements for the annual compliance reports of Swap Entities. The Commission agrees with the commenter that alignment of the content requirements will allow SBS Entities that are also registered as Swap Entities to leverage the procedures they have adopted to comply with the CFTC's parallel CCO rule.[1227] Specifically, the Commission is changing the proposed requirement in Rule 15Fk–1(c)(2)(i)(A) that the annual compliance report contain a description of the "enforcement" of the SBS Entity's policies and procedures to an "assessment of the effectiveness" of such policies and procedures.[1228] The Commission believes that an "assessment of the effectiveness" of the SBS Entity's policies and procedures is a more appropriate description because the Commission is looking for a self-evaluation in the annual compliance report, not a detailed description of the mechanisms through which the SBS Entity's policies and procedures are enforced. Additionally, the Commission believes that providing consistency with the parallel CFTC requirement will allow SBS Entities to leverage any existing procedures, as discussed above.

The Commission is also changing the proposed requirement in Rule 15Fk–1(c)(2)(i)(C) that the annual compliance report contain a description of "any recommendation for material changes to the policies and procedures" to a requirement to describe "areas for improvement, and recommended potential or prospective changes or improvements to its compliance program and resources devoted to compliance." [1229] As discussed above, this change is in response to a specific suggestion from a commenter.[1230] A description of "areas for improvement, and recommended potential or prospective changes or improvements to [an SBS Entity's] compliance program and resources devoted to compliance" is broader and would include any recommendations made by the CCO with respect to material changes to the SBS Entity's compliance policies and procedures. Accordingly, the Commission does not believe this wording change diminishes the scope of the required content of the annual compliance report. At the same time, however, this wording change makes the rule consistent with the parallel CFTC requirements and thus will allow SBS Entities to leverage any existing procedures, as discussed above.

Additionally, the Commission is changing the proposed requirement that the annual compliance report contain a description of "any material compliance matters identified since the date of the preceding compliance report" to a requirement to describe "any material non-compliance matters identified" in Rule 15Fk–1(c)(2)(i)(D).[1231] The change from "material compliance matter" to "material non-compliance matter" is in response to a specific suggestion from a commenter.[1232] It is not a substantive change and is simply intended to provide consistency with the parallel CFTC requirement to allow SBS Entities to leverage any existing procedures, as discussed above. The Commission is also otherwise adopting the definition of material non-compliance matter in Rule 15Fk–1(e)(4), as proposed.[1233] The elimination of the phrase "since the date of the preceding compliance report" in the final rule is also intended to harmonize with the parallel CFTC requirement and respond to commenters' general concerns regarding consistency with parallel CFTC requirements.[1234] Additionally, with this change, the Commission intends to clarify that the annual compliance report should describe both material non-compliance matters that are newly identified during the time period covered by the report and previously identified material non-compliance matters that have not yet been resolved as of the end of the time period covered by the report.

Finally, the Commission is adding a requirement in Rule 15Fk–1(c)(2)(i)(E) for an SBS Entity to include a description in its annual compliance report of the "financial, managerial, operational, and staffing resources set aside for compliance with the [Exchange Act] and the rules and regulations

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annual report shall, at a minimum . . . [c]ontain a description of the written policies and procedures, including the code of ethics and conflicts of interest policies, of the futures commission merchant, swap dealer, or major swap participant.").

[1226] *See* SIFMA (September 2015), *supra* note 5.

[1227] *See* SIFMA (September 2015), *supra* note 5.

[1228] *Cf.* Commodity Exchange Act Rule 3.3(e)(2)(ii) ("The annual report shall, at a minimum . . . [r]eview each applicable requirement under the Act and Commission regulations, and with respect to each . . . [p]rovide an assessment as to the effectiveness of these policies and procedures.").

[1229] *Cf.* Commodity Exchange Act Rule 3.3(e)(2)(iii) ("The annual report shall, at a minimum . . . [r]eview each applicable requirement under the Act and Commission regulations, and with respect to each . . . [d]iscuss areas for improvement, and recommend potential or prospective changes or improvements to its compliance program and resources devoted to compliance.").

[1230] *See* SIFMA (September 2015), *supra* note 5.

[1231] *Cf.* Commodity Exchange Act Rule 3.3(e)(5) ("The annual report shall, at a minimum . . . [d]escribe any material non-compliance issues identified, and the corresponding action taken.").

[1232] *See* SIFMA (September 2015), *supra* note 5.

[1233] The Commission declines to eliminate the definition of material non-compliance matter to be consistent with the CFTC's parallel requirement (which does not contain a definition), as suggested by a commenter. *See* SIFMA (September 2015), *supra* note 5. The Commission believes it is important to provide an explanation in the rule of what should be included in the annual compliance report.

[1234] *See, e.g.,* Barnard, *supra* note 5; Levin, *supra* note 5; BlackRock, *supra* note 5; Nomura, *supra* note 5.

thereunder relating to [the SBS Entity's] business as [an SBS Entity], including any material deficiencies in such resources." [1235] The Commission is adding this requirement to harmonize with the CFTC's parallel content requirement for the annual compliance reports of Swap Entities, and to respond to commenters' general concerns regarding consistency with parallel CFTC requirements.[1236] The Commission believes that a description of an SBS Entity's compliance resources and any deficiencies in such resources will be useful in assessing the compliance of the SBS Entity.

The Commission is also making a number of changes with respect to the submission of the annual compliance report. First, the Commission is aligning the deadline for submitting the report with the CFTC's deadline of 90 days after the end of the Swap Entity's fiscal year in response to concerns raised by a commenter.[1237] As adopted, Rule 15Fk–1(c)(2)(ii)(A) will require an SBS Entity's compliance report to "be submitted to the Commission within 30 days following the deadline for filing the [SBS Entity's] annual financial report with the Commission pursuant to Section 15F of the Act and rules and regulations thereunder." [1238] This represents a change from the proposed requirement that the compliance report "[a]ccompany each appropriate financial report of the [SBS Entity] that is required to be furnished to or filed with the Commission pursuant to Section 15F of the Act and rules and regulations thereunder." In response to concerns raised by a commenter, this change will provide SBS Entities with additional time to prepare their annual compliance reports after they have filed their annual financials.[1239] The Commission proposed a 60 day deadline from the end of the SBS Entity's fiscal year for the filing of an SBS Entity's annual financials, so to the extent the Commission adopts its proposed deadline for the annual financials, this change should also result in consistency with the CFTC's 90 day deadline for furnishing the annual compliance report.[1240]

Second, in connection with the change described above, the Commission is eliminating the proposed provision that "[i]f compliance reports are separately bound from the financial statements, the compliance reports shall be accorded confidential treatment to the extent permitted by law." The Commission believes this provision is no longer necessary in light of the changes we are making to Rule 15Fk–1(c)(2)(ii)(A), discussed above, which will no longer require the compliance report to accompany the SBS Entity's financial report. SBS Entities may request confidential treatment for their annual compliance reports pursuant to Exchange Act Rule 24b–2.[1241]

Third, in response to comment,[1242] the Commission is adding a new Rule 15Fk–1(c)(2)(iii) allowing an SBS Entity to request from the Commission an extension of the deadline for submitting its annual compliance report to the Commission. The Commission agrees with the commenter that it is appropriate to establish a framework for when an SBS Entity is unable to meet the deadline. Pursuant to Rule 15Fk–1(c)(2)(iii), an SBS Entity may request an extension, provided that the SBS Entity's failure to timely submit the report could not be eliminated without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission. Rule 15Fk–1(c)(2)(iii) will also be consistent with CFTC rules regarding extensions of deadlines for compliance reports by Swap Entities.[1243]

Fourth, the Commission is changing the required timing of submission of the compliance report to the board of directors, audit committee and senior officer of the SBS Entity. The timing requirement in proposed Rule 15Fk–1(c)(3)(ii)(B) ("at the earlier of their next scheduled meeting or within 45 days of the date of execution of the required certification") was based on the timeframe provided in the FINRA rule regarding annual certification of compliance and supervisory processes.[1244] The FINRA rule allows for submission of the compliance report to the board of directors either before or after execution of the required certification.[1245] The Commission understands, however, that prudent corporate governance generally would require submission to the board of directors and senior officer before the execution of the certification. Accordingly, as adopted, Rule 15Fk–1(c)(2)(ii)(B) requires that the compliance report be submitted to the board of directors, audit committee and senior officer of the SBS Entity "prior to submission to the Commission." This timing requirement will be consistent with both Commission rules regarding compliance reports by SDRs and CFTC rules regarding compliance reports by Swap Entities.[1246] This consistency with CFTC requirements will allow SBS Entities to leverage any existing procedures, as discussed above.

The Commission declines to modify this provision, as suggested by a commenter, to allow for submission of the compliance report to either the board or the senior officer.[1247] The Commission believes that requiring submission to the board, audit committee and senior officer will promote an effective compliance system by ensuring that all of these groups, not just the senior officer, have the opportunity to review the report. The Commission believes it is important for the board, the audit committee and the senior officer to all have the opportunity to receive the compliance report so that they remain informed regarding the SBS Entity's compliance system in the context of their overall responsibility for governance and internal controls of the SBS Entity. However, the Commission declines to explicitly require the board to review and comment on the compliance report, require the audit committee to review the compliance report, or require the CCO to meet quarterly with the audit committee, as suggested by other commenters.[1248] The Commission does not think it is necessary to explicitly require the board, audit committee or senior officer to review or comment on the compliance report that they receive, or to require the CCO to meet with the audit committee because we believe the goals of the rule can be achieved without such a requirement.

[1235] *Cf.* Commodity Exchange Act Rule 3.3(e)(4) ("The annual report shall, at a minimum . . . [d]escribe the financial, managerial, operational, and staffing resources set aside for compliance with respect to the [Commodity Exchange Act] and [CFTC] regulations, including any material deficiencies in such resources.").

[1236] *See, e.g.,* Barnard, *supra* note 5; Levin, *supra* note 5; BlackRock, *supra* note 5; Nomura, *supra* note 5.

[1237] *See* SIFMA (September 2015), *supra* note 5; No-Action Relief for Futures Commission Merchants, Swap Dealers, and Major Swap Participants from Compliance with the Timing Requirements of Commission Regulation 3.3(f)(2) Relating to Annual Reports by Chief Compliance Officers, CFTC Letter No. 15–15 (Mar. 27, 2015), available at *http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-15.pdf.*

[1238] Section 15F(k)(3)(B)(i) of the Exchange Act provides that a compliance report shall "accompany each appropriate financial report of the [SBS Entity] that is required to be furnished to the Commission pursuant to this section." 15 U.S.C. 78o–10(k)(3)(B)(i). The Commission is interpreting "accompany" in Section 15F(k)(3)(B)(i) to mean follow within 30 days.

[1239] *See* SIFMA (September 2015), *supra* note 5.

[1240] *See* Recordkeeping Release, 79 FR at 25135, *supra* note 242.

[1241] *See* 17 CFR 240.24b–2. The change to the rule renders moot a commenter's request that the Commission amend its FOIA regulations in a manner consistent with proposed Rule 15Fk–1(c)(2)(iii). *See* FIA/ISDA/SIFMA, *supra* note 5.

[1242] *See* SIFMA (September 2015), *supra* note 5.

[1243] *See* Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20201 (Apr. 3, 2012) ("CFTC CCO Adopting Release").

[1244] *See* FINRA Rule 3130(c).

[1245] *Id.*

[1246] *See* SDR Registration Release, 80 FR at 14512, *supra* note 1202; CFTC CCO Adopting Release, 77 FR at 20201, *supra* note 1243.

[1247] *See* SIFMA (September 2015), *supra* note 5.

Additionally, in response to concerns raised by a commenter [1249] and to harmonize with the parallel CFTC requirement and FINRA Rule 3130, the Commission is eliminating: (1) The proposed requirement that the report contain a written representation regarding the required annual meeting between the senior officer and the CCO, and (2) the proposed specifications for what topics such meeting must cover. The Commission agrees with the commenter that since the purpose of the required annual meeting between the senior officer and CCO is to discuss the annual compliance report and since the contents of the annual compliance report are already specified in Rule 15Fk–1(c)(2)(i), it is unnecessary to also specify the topics that should be discussed in the annual meeting. Additionally, this consistency with CFTC and FINRA requirements will allow SBS Entities to leverage any existing procedures, as discussed above.

To address concerns raised by commenters,[1250] we also are modifying Rule15Fk–1(c)(2)(ii)(D) to provide that either the senior officer or CCO can execute the compliance report certification and to add knowledge and materiality qualifiers to the certification requirement. The proposed rule would have required the compliance report to include a certification that, under penalty of law, the compliance report is accurate and complete, without specifying who must execute the certification. As adopted, Rule 15Fk–1(c)(2)(ii)(D) requires the compliance report to include a certification "from the senior officer or Chief Compliance Officer that, to the best of his or her knowledge and reasonable belief, under penalty of law, the compliance report is accurate and complete in all material respects." The Commission believes that allowing either the senior officer or CCO to execute the certification is appropriate because both the senior officer and the CCO should be in a position to certify the accuracy and completeness of the compliance report. As noted by a commenter,[1251] Exchange Act Section 15F(k)(3)(B)(ii) requires that the compliance report include a certification but does not specify who must execute the certification.[1252] The FINRA rule regarding annual certification of compliance and supervisory processes requires the CEO (or an equivalent officer) to execute the certification.[1253] In contrast, Commission rules regarding compliance reports by SDRs require the CCO to execute the certification.[1254] CFTC rules regarding compliance reports by Swap Entities allow either the CEO or the CCO to execute the required certification.[1255] Rule 15Fk–1(c)(2)(ii)(D) will be consistent with the parallel CFTC rule and will allow flexibility for SBS Entities who might also be registered broker-dealers and FINRA members, and therefore, subject to the FINRA rule regarding annual certification of compliance and supervisory processes. As discussed above, consistency with CFTC requirements will allow SBS Entities to leverage any existing procedures.

Additionally, the Commission believes it is appropriate to add the knowledge and materiality qualifiers described above to the required certification to address commenters' concerns regarding the liability standard for the certification.[1256] The Commission believes that a certification to the best of the knowledge and reasonable belief of the certifying officer that the compliance report is accurate and complete in all material respects is appropriate to ensure effective reporting with respect to the compliance of the SBS Entity.[1257]

In response to a specific suggestion from a commenter,[1258] the Commission is also adding a new Rule 15Fk–1(c)(2)(iv) allowing an SBS Entity to incorporate by reference sections of a compliance report that have been submitted within the current or immediately preceding reporting period to the Commission. The rule allows an SBS Entity to: (1) Incorporate by reference items from a previous year's compliance report, or (2) for an SBS Entity that is registered in more than one capacity with the Commission and required to submit more than one compliance report,[1259] incorporate by reference into its compliance report required by Rule 15Fk–1(c) sections in another compliance report submitted to the Commission by it in its capacity as another type of registered entity within the current or immediately preceding reporting period.[1260] The Commission is limiting incorporation by reference to reports submitted within the current or immediately preceding reporting period, which will be the fiscal year of the SBS Entity, because we want to ensure that compliance reports do not simply continue to refer back to prior year's reports. Rule 15Fk–1(c)(2)(iv) will also be consistent with CFTC rules regarding compliance reports by Swap Entities.[1261]

Finally, in response to a specific suggestion from a commenter,[1262] the Commission is adding a new Rule 15Fk–1(c)(2)(v) requiring an SBS Entity to submit an amended compliance report if material errors or omissions in the report are identified. The amended report must contain the required certification by the CCO or senior officer, described above. The Commission is adding this rule to promote accurate and complete compliance reports. When an SBS Entity discovers a material error or omission in its annual compliance report subsequent to submitting the report to the Commission, we believe it is appropriate for an SBS Entity to be required to submit an amended report. This does not include a situation where an SBS Entity's annual compliance report becomes inaccurate or incomplete due to events occurring after the coverage date of the report. Material errors or omissions should be judged as of the coverage date of the report. Rule 15Fk–1(c)(2)(v) will also be consistent with CFTC rules regarding amended compliance reports by Swap Entities.[1263]

[1248] *See* Better Markets (August 2011), *supra* note 5; Better Markets (October 2013), *supra* note 5; CFA, *supra* note 5.

[1249] *See* SIFMA (September 2015), *supra* note 5.

[1250] *See* FIA/ISDA/SIFMA, *supra* note 5 (requesting that the CEO or other relevant senior officer be the individual responsible for executing the certification, or in the alternative, if the CCO is required to certify, that the CEO also be required to do so); CFA, *supra* note 5 (requesting that the CCO be the individual responsible for executing the certification); SIFMA (September 2015), *supra* note 5 (requesting that either the senior officer or CCO be permitted to execute the certification).

[1251] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1252] *See* Section 15F(k)(3)(B)(ii) of the Exchange Act, 15 U.S.C. 78o–10(k)(3)(B)(ii).

[1253] *See* FINRA Rule 3130(c).

[1254] *See* SDR Registration Release, 80 FR at 14511–14512, *supra* note 1202.

[1255] *See* CFTC CCO Adopting Release, 77 FR at 20201, *supra* note 1243.

[1256] *See* FIA/ISDA/SIFMA, *supra* note 5; SIFMA (September 2015), *supra* note 5. *Contra*. CFA, *supra* note 5 (arguing that the CCO should not be permitted to qualify its report).

[1257] *Cf.* General Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii) (requiring an attorney who signs a filing with the Commission to certify that "to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law").

[1258] *See* SIFMA (September 2015), *supra* note 5.

[1259] *See* SDR Registration Release, 80 FR at 14510–14512, *supra* note 1202.

[1260] The Commission declines to permit the consolidation of annual compliance reporting requirements for SBS Entities under common control, as suggested by one commenter. *See* FIA/ISDA/SIFMA, *supra* note 5. The Commission believes it is appropriate to require an SBS Entity to submit a separate compliance report, as contemplated by Section 15F(k)(3)(B) of the Exchange Act. However, as discussed above, the Commission has made a number of changes to Rule 15Fk–1 to further harmonize the requirements of the rule with FINRA Rule 3130 and the CFTC's CCO requirements for Swap Entities so that SBS Entities that are also registered broker-dealers that are FINRA members and/or Swap Entities can leverage their existing procedures to comply with the rule.

[1261] *See* CFTC CCO Adopting Release, 77 FR at 20201, *supra* note 1243.

[1262] *See* SIFMA (September 2015), *supra* note 5.

J. Prime Brokerage Transactions

One commenter recommended that the Commission adopt a new rule that would, in connection with security-based swaps executed under a prime brokerage arrangement, permit the executing dealer and prime broker to allocate responsibility for compliance with certain external business conduct obligations in a manner consistent with CFTC No-Action Letter 13–11.[1264] The commenter noted that the Commission staff has previously addressed circumstances in which the executing broker and prime broker in a securities prime brokerage arrangement allocate certain responsibilities between themselves in different contexts.[1265]

The commenter described a particular situation in which a counterparty ("Prime Broker Client") enters into an agreement with a registered SBS Dealer ("Prime Broker"). That agreement establishes parameters under which the Prime Broker Client, acting as agent of the Prime Broker, can negotiate and enter into security-based swaps with certain registered SBS Dealers (collectively, the "Executing Dealer"). If a security-based swap negotiated by the Prime Broker Client with the Executing Dealer is accepted by the Prime Broker, the Prime Broker will enter into a corresponding security-based swap with the Prime Broker Client, the terms of which mirror the terms of the security-based swap between the Executing Dealer and the Prime Broker, subject to associated prime brokerage fees agreed by the parties.

In these circumstances, the Prime Broker Client may have entered into a security-based swap with the Prime Broker based not only on communications with the Prime Broker but also on communications including disclosure of material terms and other representations, and possibly on the basis of a recommendation by the Executing Dealer. According to this commenter, in these circumstances, the Prime Broker is in the best position to take responsibility for compliance with the external business conduct standards that relate to the general relationship between the Prime Broker and the Prime Broker Client, whereas the Executing Dealer is in the best position to take responsibility for compliance with business conduct standards that are transaction-specific. The commenter expressed the view that unless SBS Dealers are permitted to allocate compliance with the external business conduct standards between the Prime Broker and the Executing Dealer, it would be impossible to continue existing prime brokerage arrangements.[1266]

The commenter proposed a rule under which the Prime Broker and the Executing Dealer would have the full range of business conduct obligations that they would allocate between themselves. The commenter's request is beyond the scope of this rulemaking although we acknowledge the concerns raised by the commenter, and may consider them in the future.

K. Other Comments

The CFTC proposed rules regarding best execution and front running that it did not ultimately adopt. One commenter urged the Commission to adopt a best execution requirement similar to the CFTC's proposal.[1267] Another commenter urged the Commission not to adopt a prohibition on front running.[1268] Although the Commission is not adopting such rules, we note that SBS Entities remain subject to the antifraud provisions of the federal securities laws, including the antifraud provisions of Exchange Act Section 15H(h)(4)(A) and Rule 15Fh–4(a), as discussed in Section II.H.4, with respect to their dealings with counterparties.

The Commission did not propose rules regarding portfolio reconciliation and compression. Four commenters generally supported portfolio reconciliation and compression requirements.[1269] A fifth commenter asserted that inter-affiliate swaps should not trigger portfolio reconciliation and compression requirements.[1270] The Commission is not adopting rules regarding portfolio reconciliation and compression at this time.

III. Cross-Border Application and Availability of Substituted Compliance

A. Cross-Border Application of Business Conduct Requirements

1. Proposed Rule

The Commission proposed generally to apply all requirements in Section 15F of the Exchange Act, and the rules and regulations thereunder, to all SBS Entities, whether U.S. persons or non-U.S. persons.[1271] The Commission also proposed to classify each requirement that applies to SBS Entities either as a transaction-level requirement, which applies to specific transactions, or as an entity-level requirement, which applies to the dealing entity as a whole.[1272] In this taxonomy, entity-level requirements would include most requirements applicable to SBS Entities, including those relating to the CCO requirements under Section 15F(k) of the Exchange Act, the supervision requirement under Section 15F(h)(1)(B) of the Exchange Act, and the requirement to establish procedures to comply with the duties set forth in Section 15F(j) of the Exchange Act, including conflict of interest systems and procedures.[1273] Transaction-level requirements would include primarily business conduct standards under Section 15F(h) of the Exchange Act (except for the diligent supervision requirement under Section 15F(h)(1)(B) of the Exchange Act).[1274]

Under the proposed approach, the entity-level requirements would apply to all transactions of an SBS Entity, regardless of the U.S.-person status of the SBS Entity or its counterparty to any particular transaction.[1275] With respect to the business conduct standards under Section 15F(h) of the Exchange Act (except for the diligent supervision requirement under Section 15F(h)(1)(B) of the Exchange Act), however, the

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[1263] *See* CFTC CCO Adopting Release, 77 FR at 20201, *supra* note 1243.

[1264] *See* SIFMA (August 2015), *supra* note 5.

[1265] *See* Letter to Mr. Jeffrey C. Bernstein, Prime Broker Committee, from Brandon Becker, Director, Division of Market Regulation, Commission, dated January 25, 1994.

[1266] We recognize that there may be other ways that parties structure their prime brokerage arrangements. The above discussion is based on the description of the arrangement in the proposed rule text provided by the commenter.

[1267] *See* CFA, *supra* note 5.

[1268] *See* SIFMA (August 2011), supra note 5. Front running refers to an entity entering into a transaction for its own benefit ahead of executing a counterparty transaction.

[1269] *See* Barnard, *supra* note 5; Levin, *supra* note 5; Markit, *supra* note 5; MarkitSERV, *supra* note 5.

[1270] *See* ABA Securities Association, *supra* note 5.

[1271] *See* Cross-Border Proposing Release, 78 FR 31009, 31035, *supra* note 6. The Commission noted in the Cross-Border Proposing Release its longstanding "view that an entity that has registered with the Commission subjects itself to the entire regulatory system governing such registered entities." *Id.* at 30986.

[1272] *See* Cross-Border Proposing Release, 78 FR 31009, 31035, *supra* note 6.

[1273] *See* Cross-Border Proposing Release, 78 FR 31014–15, 31035, *supra* note 6.

[1274] *See* Cross-Border Proposing Release, 78 FR 31010, 31035, *supra* note 6. *See also* U.S. Activity Proposing Release, 80 FR 27473, *supra* note 9.

[1275] *See* Cross-Border Proposing Release, 78 FR 31026–27, 31035, *supra* note 6.

Commission proposed to provide an exception from these requirements for certain transactions of SBS Entities, proposing slightly different approaches for SBS Dealers and Major SBS Participants.

With respect to SBS Dealers, the Commission proposed a rule that would have provided that registered foreign SBS Dealers and registered U.S. SBS Dealers, with respect to their foreign business, would not be subject to the requirements relating to business conduct standards described in Section 15F(h) of the Exchange Act,[1276] and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B).[1277] The proposed rule would define "foreign business" for both foreign SBS Dealers and U.S. SBS Dealers to mean any security-based swap transactions entered into, or offered to be entered into, by or on behalf of the SBS Dealer that do not include its U.S. business.[1278] The proposed definition of "U.S. business," however, would differ for foreign SBS Dealers and U.S. SBS Dealers. For a foreign SBS Dealer, "U.S. business" would mean (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign SBS Dealer, with a U.S. person (other than with a foreign branch), or (ii) any transaction conducted within the United States.[1279] For a U.S. SBS Dealer, "U.S. business" would mean any transaction by or on behalf of such U.S. SBS Dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch of a U.S. person.[1280]

In April 2015, the Commission re-proposed the rule defining the application of business conduct rules to SBS Dealers to incorporate the modified approach to U.S. activity proposed in that release and to make certain technical changes to the "foreign business" definition relating to transactions conducted through a foreign branch.[1281] Under the modified approach, "U.S. business" of a foreign SBS Dealer would have been defined to mean (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign SBS Dealer, with a U.S. person (other than a transaction conducted through a foreign branch of that person), or (ii) any security-based swap transaction that is arranged, negotiated, or executed by personnel of the foreign SBS Dealer located in a U.S. branch or office, or by personnel of its agent located in a U.S. branch or office.[1282] With respect to a U.S. SBS Dealer, "U.S. business" would have been defined to mean "any transaction by or on behalf of such U.S. SBS Dealer, entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty."[1283] The definitions of "U.S. security-based swap dealer,"[1284] "foreign security-based swap dealer,"[1285] and "foreign business"[1286] remained unchanged from the initial proposal, as did the text of re-proposed Rule 3a71–3(c), which would create the exception to the business conduct requirements for the foreign business of registered security-based swap dealers.

With respect to Major SBS Participants, the Commission proposed to provide an exception from the business conduct standards as described in Section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B)), only for foreign Major SBS Participants, with respect to their transactions with non-U.S. persons.[1287]

2. Comments on the Proposed Application of Business Conduct Requirements to SBS Entities

In response to the U.S. Activity Proposing Release, commenters focused on the proposal to impose business conduct standards on a transaction of a registered foreign SBS Dealer with other non-U.S. persons when the SBS Dealer uses personnel located in the United States to arrange, negotiate, or execute the transaction. Several commenters expressed general support for the Commission's proposed test to determine when various Title VII requirements should apply to transactions between two non-U.S. persons based on U.S. activity.[1288] Moreover, although these commenters generally urged that the Commission not impose business conduct requirements (or impose only certain of the requirements, as described below) on a registered foreign SBS Dealer solely based on U.S. activity, they indicated that they support the tailoring of the Commission's test ("U.S. Activity Test") from the initial proposal, if the Commission ultimately determines that the business conduct requirements should apply to such transactions.[1289] One commenter urged the Commission to return to its initially proposed approach to the definition of

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[1276] 15 U.S.C. 78o–10(h). *See* proposed Rule 3a71–3(c) (providing a partial exception from certain transaction-level business conduct standards for foreign SBS Dealers in connection with their foreign business); *see also* Cross-Border Proposing Release, 78 FR 31016–18, *supra* note 6.

[1277] *See* Cross-Border Proposing Release, 78 FR 31016, *supra* note 6. Section 15F(h)(1)(B) requires registered SBS Dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe. *See* 15 U.S.C. 78o–10(h)(1)(B).

[1278] *See* Cross-Border Proposing Release, 78 FR 31016, *supra* note 6.

[1279] *See* Cross-Border Proposing Release, 78 FR 31016, *supra* note 6. Whether the activity in a transaction involving a registered foreign SBS Dealer occurred within the United States or with a U.S. person for purposes of identifying whether security-based swap transactions are part of U.S. business would have turned on the same factors used in that proposal to determine whether a foreign SBS Dealer is engaging in dealing activity within the United States or with U.S. persons and whether a U.S. person was conducting a transaction through a foreign branch. *See* Cross-Border Proposing Release, 78 FR 31016, *supra* note 6.

[1280] *See* Cross-Border Proposing Release, 78 FR 31016, *supra* note 6.

[1281] U.S. Activity Proposing Release, 80 FR 27475, *supra* note 9. *See also* proposed Rule 3a71–3(c) and proposed Rules 3a71–3(a)(6), (7), (8), and (9).

[1282] Proposed Rule 3a71–3(a)(8)(i). The Commission explained in the U.S. Activity Proposing Release that it intended the proposed rule to indicate the same type of activity by personnel located in the United States as it proposed to use in the *de minimis* context. Moreover, for purposes of proposed Rule 3a71–3(a)(8)(i)(B), the Commission explained that it would interpret the term "personnel" in a manner consistent with the definition of "associated person of a security-based swap dealer" contained in section 3(a)(70) of the Exchange Act, 15 U.S.C. 78c(a)(70), regardless of whether such non-U.S. person or such non-U.S. person's agent is itself a security-based swap dealer. *See* U.S. Activity Proposing Release 80 FR at 27469 n.193, *supra* note 9.

[1283] Proposed Rule 3a71–3(a)(8)(ii).

[1284] *See* proposed Rule 3a71–3(a)(6).

[1285] *See* proposed Rule 3a71–3(a)(7).

[1286] *See* proposed Rule 3a71–3(a)(9).

[1287] *See* proposed Rule 3a67–10(b) (providing that a Major SBS Participant "shall not be subject, with respect to its security-based swap transactions with counterparties that are not U.S. persons, to the requirements relating to business conduct standards" in Section 15F(h) of the Exchange Act and the rules and regulations thereunder, other than rules and regulations prescribed pursuant to Section 15F(h)(1)(B) of the Exchange Act); proposed Rule 3a67–10(a)(1) (defining "foreign major security-based swap participant").

[1288] *See, e.g.*, SIFMA/FSR (July 2015), *supra* note 10; IIB (July 2015), *supra* note 10.

[1289] *See* IIB (July 2015), *supra* note 10, at 2; SIFMA/FSR (July 2015), *supra* note 10, at 3, 10. One commenter supported the proposal's use of the same U.S. Activity Test for business conduct as for *de minimis* calculations because applying the business conduct standards solely based on the use of a U.S. fund manager is not dealing activity, would be inconsistent with investor expectations, and is unnecessary to protect the U.S. markets. *See* ICI Global (July 2015), *supra* note 10, at 2, 5.

"transactions conducted within the United States," which would have looked to the location of relevant activity of both counterparties.[1290] Such an approach would thus apply the business conduct requirements fully to any transactions involving activity in the United States, not just dealing activity in the United States but also relevant activity carried out by a non-dealing counterparty in the United States.[1291]

Some commenters that objected to the Commission's proposed approach argued that none of the business conduct requirements should apply to transactions between non-U.S. persons, even if these transactions involve U.S. activity and therefore constitute "U.S. business" under the proposed definition.[1292] These commenters explained that the non-U.S. counterparties of foreign SBS Dealers do not expect these protections; the dealer is likely to be subject to similar requirements in its home jurisdiction; and application is unlikely to protect the U.S. market and is inconsistent with international comity.[1293] In a related comment, one commenter explained that the business conduct requirements, as well as other requirements related to reporting and dealer registration, should not apply to transactions that are executed on an anonymous electronic platform or other means that "involve[s] no human contact within the United States," because the parties would have no expectation that the rules would apply to such a transaction.[1294]

Some commenters taking this view also explained that U.S. asset managers may face challenges in servicing non-U.S. client accounts under the proposed approach, noting that non-U.S. clients may be reluctant to deal with Dodd-Frank-related documentation or to make required representations and describing the significant burdens these requirements would impose on asset managers.[1295] One of these commenters argued that the U.S. Activity Proposing Release considered only the costs of the SBS Dealers that would be directly subject to the business conduct requirements but not the costs borne by buy-side market participants, such as asset managers.[1296]

Some commenters that objected to the Commission's proposed application of business conduct requirements to transactions between two non-U.S. persons solely on the basis of activity in the United States urged the Commission to limit the application to specific requirements that, in the commenters' views, address regulatory concerns directly related to the relevant activity in the United States. These commenters supported dividing the business conduct requirements into two separate categories of "relationship-based" requirements and "transaction-specific" or "communication-based" requirements.[1297] Commenters argued that relationship-based requirements—which they identified as requirements related to counterparty status, disclosure of daily marks, know your counterparty, and counterparty suitability—should not apply to transactions between two non-U.S. persons solely on the basis of U.S. activity for reasons similar to those described above.[1298]

On the other hand, commenters explained that application of business conduct requirements that are "communication-based" or transaction-specific—which they identified as including disclosure of material risks and characteristics and material incentives or conflicts of interest and related recordkeeping, disclosures regarding clearing rights and related recordkeeping, product suitability, and fair and balanced communications and supervision—to such transactions would be simpler and less costly to implement.[1299] These commenters, however, urged the Commission, if it does apply the transaction-specific requirements to these transactions, to harmonize FINRA's existing sales practice requirements with the "communication-based" or transaction-specific rules applicable under Title VII to avoid unnecessary duplication or conflicts, as the U.S. activity in many of these transactions may be carried out by registered broker-dealers subject to

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[1290] *See* Better Markets (July 2015), *supra* note 10, at 3, 6.

[1291] *See id.*

[1292] *See* ICI Global (July 2015), *supra* note 10, at 2, 5–6; SIFMA–AMG (July 2015), *supra* note 10, at 2, 5 (stating that non-U.S. clients do not expect U.S. protections to apply to transactions between two non-U.S. persons). *See also* ISDA (July 2015), *supra* note 10, at 2 (urging that the Commission not apply the business conduct requirements to transactions solely because the transaction involves U.S. activity); ISDA (July 2015), *supra* note 10, at 8 (arguing that the Commission does not have a supervisory interest in imposing entity-level requirements in connection with security-based swap transactions between two non-U.S. persons that are cleared outside the United States, even if they are arranged, negotiated, or executed by personnel located in the United States).

[1293] *See* ICI Global (July 2015), *supra* note 10, at 5–6; SIFMA–AMG (July 2015), *supra* note 10, at 2, 5; IIB (July 2015), *supra* note 10, at 11; SIFMA/FSR (July 2015), *supra* note 10, at 9. *See also* ISDA (July 2015), *supra* note 10, at 2, n.7 (recommending that the final business conduct rules be consistent with the CFTC's business conduct rules); Barnard (July 2015) at 2, *supra* note 10 (recommending that the rules proposed in the U.S. Activity Proposing Release be consistent with the rules proposed by the CFTC); MFA (July 2015), *supra* note 10, at 4 (emphasizing need for Commission and its U.S. counterparts to develop a single, harmonized approach to cross-border derivatives regulation).

[1294] *See* ISDA (July 2015), *supra* note 10, at 7.

[1295] Specifically, the commenters expressed concern that, under the proposal, the U.S. asset manager executing a trade on behalf of a non-U.S. client would need to know whether the transaction involved U.S. activity and would also need to verify that the non-U.S. client satisfies the business conduct requirements. *See* SIFMA–AMG (July 2015), *supra* note 10, at 4; ICI Global (July 2015), *supra* note 10, at 6 (explaining that regulated fund parties would need appropriate documentation and representations in place to execute such trades and would face interruptions in investment activities in doing so).

[1296] *See* SIFMA–AMG (July 2015), *supra* note 10, at 4–5. This commenter specifically argued that the proposed rules would effectively require asset managers to verify the eligibility of a non-U.S. client as having satisfied the Commission's business conduct requirements, imposing costs on asset managers and, through impeding block trades on behalf of U.S. persons and non-U.S. persons, negatively affecting liquidity and execution price. *See* SIFMA–AMG (July 2015), *supra* note 10, at 4. The commenter also argued that the proposed approach has "no ascertainable benefit" to non-U.S. counterparties who would not expect the protections and would instead look to the law of the dealer's jurisdiction or its own jurisdiction. *See* SIFMA–AMG (July 2015), *supra* note 10, at 5.

[1297] *See* SIFMA/FSR (July 2015), *supra* note 10, at 8–10; IIB (July 2015), *supra* note 10, at 11–13.

[1298] For example, one commenter argued that non-U.S. counterparties would not expect such protections and that the requirements may duplicate requirements in the counterparty's home jurisdiction. *See* SIFMA/FSR (July 2015), *supra* note 10, at 8–9. Commenters also argued that the non-U.S. counterparty would not expect to provide any representations as to its status or to complete questionnaires to comply with U.S. relationship-level requirements, particularly at the beginning of a trading relationship when neither counterparty may expect the relationship to involve U.S. activity and that such burdens have no benefit. *See* SIFMA/FSR (July 2015), *supra* note 10, at 8–9; IIB (July 2015), *supra* note 10, at 11–12 (arguing that non-U.S. counterparties would not expect the "trade-relationship" requirements to apply in their trades with non-U.S. persons and would be surprised to be required to agree to covenants or fill out questionnaires related to U.S. requirements); SIFMA–AMG (July 2015), *supra* note 10, at 4 (explaining that non-U.S. clients of asset managers would be surprised to need to verify eligibility under the business conduct requirements after instructing asset managers to trade only with non-U.S. dealers). *See also* ICI Global (July 2015), *supra* note 10, at 6 (noting that, even though the registered dealer (and not the non-U.S. person) is subject to the business conduct requirements, the non-U.S. fund counterparty would likely need to have in place appropriate documentation and representations if its dealer is subject to business conduct requirements, which may cause interruptions in their investment activities).

[1299] *See* IIB (July 2015), *supra* note 10, at 12–13 (noting that compliance with these requirements would not require "wholesale modifications" to the relationship documentation or onboarding processes as long as the non-U.S. security-based swap dealer is able to satisfy the requirements under the rules of the relevant non-U.S. jurisdictions and that there may be benefits to applying these rules uniformly to front office personnel in the United States as a supplement to generally applicable antifraud and anti-manipulation rules); SIFMA/FSR (July 2015), *supra* note 10, at 9–10 (explaining that the application of these rules would be consistent with the parties' expectations).

FINRA requirements.[1300] One commenter requested that if the Commission does apply relationship-based requirements to transactions involving U.S. activity, it make substituted compliance available to foreign registered SBS Dealers in such transactions.[1301]

Two commenters suggested that, if the Commission does apply the business conduct requirements as proposed, it offer an "opt-out" for sophisticated non-U.S. person counterparties that would allow them to trade under their existing documentation rather than develop new documentation pursuant to U.S. rules.[1302] One commenter explained that, because the requirements are for the benefit of the non-U.S. counterparty, that counterparty should be able to waive them.[1303]

Two commenters argued that the Commission should not allow concern about special entity protections to influence its consideration of whether U.S. activity alone should trigger business conduct requirements. These commenters noted that the Commission has previously explained that only U.S. persons would be special entities and, as such, a registered foreign SBS Dealer would already be subject to the full range of business conduct requirements in transactions with special entities, because such transactions would constitute "U.S. business" under the proposed approach even if the Commission were to eliminate U.S. Activity from the definition of "U.S. business." [1304]

3. Response to Comments and Final Rule

After considering the comments, the Commission is adopting final Rule 3a71–3(c) and amendments to the definitions in Rule 3a71–3(a) largely unchanged from the April 2015 re-proposal.[1305] The Commission is also adopting amendments to Rule 3a67–10 to incorporate an exception from these requirements for registered Major SBS Participants, modified slightly from the initial proposal. Consistent with the Cross-Border Proposing Release, the Commission is not providing any exception from the entity-level requirements being adopted in this release.[1306]

a. Entity-Level Requirements for SBS Entities

The Commission continues to believe that the rules and regulations prescribed by the Commission relating to diligent supervision pursuant to Section 15F(h)(1)(B), those relating to the CCO under Section 15F(k) of the Exchange Act, and those relating to requirements under Section 15F(j) of the Exchange Act should be treated as entity-level requirements that apply to the entire business of the registered foreign or U.S. SBS Entity.[1307] Accordingly, the following requirements would apply to all security-based swap transactions of an SBS Entity, regardless of the U.S.-person status of the SBS Entity or that of its counterparty in any particular transaction: [1308] Supervision requirements under Rule 15Fh–3(h), including the requirement in Rule 15Fh–3(h)(2)(iii)(I) that SBS Entities establish procedures reasonably designed to comply with the duties set forth in Section 15F(j) of the Exchange Act; and CCO requirements under Rule 15Fk–1. The Commission, however, is adopting a rule that would potentially make substituted compliance available for these requirements for registered foreign SBS Entities as discussed below.[1309]

As the Commission has previously stated, it is appropriate to subject a registered SBS Entity to the diligent supervision requirements regardless of the status or location of its counterparties to ensure that the SBS Entity is adequately supervising its business and its associated persons to ensure compliance with the full range of its obligations under the federal securities laws.[1310] Similarly, the Commission continues to believe that Rule 15Fh–3(h)(2)(iii)(I), which requires SBS Entities to establish procedures to comply with the duties set forth in Section 15F(j) of the Exchange Act, including conflict of interest systems and procedures, should apply to all of an SBS Entity's security-based swap transactions, as such systems and procedures cannot be effective unless so applied.[1311] As we have previously noted, to prevent conflicts of interest from biasing the judgment or supervision of these entities, application to only a portion of an SBS Entity's security-based swap transactions would not be effective at addressing conflicts that may arise as a result of transactions that arise out of an SBS Entity's foreign business.[1312] Each of the remaining duties under section 15F(j) [1313] would not be effective if not applied at the entity level.[1314]

[1300] *See* SIFMA/FSR (July 2015), *supra* note 10, at 9–10; IIB (July 2015), *supra* note 10, at 13. Commenters also urged the Commission to work toward a harmonized approach to all the business conduct rules with the CFTC and FINRA to ensure that security-based swap dealers and swap dealers are not subject to two different sets of business conduct requirements. *See* ISDA (July 2015), *supra* note 10, at 2, n.7; IIB (July 2015), *supra* note 10, at 6, 7. *See also* ISDA (July 2015), *supra* note 10, at 9 (asking the Commission to evaluate whether imposing business conduct requirements adds value if the intermediary is already subject to broker-dealer regime).

[1301] *See* IIB (July 2015), *supra* note 10, at 12.

[1302] *See* IIB (July 2015), *supra* note 10, at 13; SIFMA/FSR (July 2015), *supra* note 10, at 10–11 (requesting the non-U.S. counterparty have option to opt-out of "transaction-specific" rules if they apply solely as a result of U.S. activity).

[1303] *See* SIFMA/FSR (July 2015), *supra* note 10, at 10–11.

[1304] *See* IIB (July 2015), *supra* note 10, at 12; SIFMA/FSR (July 2015), *supra* note 10, at 9.

[1305] The final rules incorporate minor conforming edits. The definition of U.S. business for U.S. security-based swap dealers (Rule 3a71–3(a)(8)(ii)) is modified for consistency with the surrounding rules by moving the phrase "entered into or offered to be entered into" and deleting the word "wherever" to further clarify that the definition of U.S. business for a U.S. security-based swap dealer does not depend on the location of personnel arranging, negotiating, or executing the transaction. Rule 3a71–3(a)(9) defining foreign business and Rule 3a71–3(c) contain minor edits to simplify the rule text primarily by eliminating unnecessary separate references to U.S. and foreign security-based swap dealers.

[1306] The Commission does not believe that these final rules apply Title VII to persons that are "transact[ing] a business in security-based swaps without the jurisdiction of the United States," within the meaning of section 30(c) of the Exchange Act. A final rule that did not treat security-based swaps that a registered foreign security-based swap dealer has arranged, negotiated, or executed using its personnel or personnel of its agent located in the United States as the "U.S. business" of that dealer for purposes of proposed Exchange Act rule 3a71–3(c) would, in our view, reflect an understanding of what it means to conduct a security-based swap dealing business within the jurisdiction of the United States that is divorced both from Title VII's statutory objectives and from the various structures that non-U.S. persons use to engage in security-based swap dealing activity. But in any event we also believe that the final rule is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the Exchange Act that were added by the Dodd-Frank Act, and thus help prevent the relevant purposes of the Dodd-Frank Act from being undermined. *See* Cross-Border Adopting Release, 79 FR 47291–92, *supra* note 193 (interpreting anti-evasion provisions of Exchange Act Section 30(c)). Without this rule, non-U.S. persons could simply carry on a dealing business within the United States with non-U.S. persons. Permitting this activity could allow these firms to retain full access to the benefits of operating in the United States while avoiding compliance with business conduct requirements, which could increase the risk of misconduct. *See* U.S. Activity Proposing Release, 80 FR 27477 n.255, *supra* note 9.

[1307] *See* Cross-Border Proposing Release, 78 FR 31013–15, *supra* note 6 (classifying these requirements, among others, as entity-level). *But see* ISDA (July 2015), *supra* note 10, at 8 (arguing that the Commission does not have a supervisory interest in imposing entity-level requirements in connection with security-based swap transactions between two non-U.S. persons that are cleared outside the United States, even if they are arranged, negotiated, or executed by personnel located in the United States).

[1308] *See* Cross-Border Proposing Release, 78 FR 31026–27, 31035, *supra* note 6.

[1309] *See* Section III.B, *infra*.

[1310] *See* Cross-Border Proposing Release, 78 FR 31014, 31017, *supra* note 6.

[1311] *See* Cross-Border Proposing Release, 78 FR 31013–14, *supra* note 6.

[1312] *See* Cross-Border Proposing Release, 78 FR 31014, *supra* note 6.

[1313] Section 15F(j) of the Exchange Act requires an SBS Entity to comply "at all times" with

The CCO requirements under Rule 15Fk–1 also raise entity-wide concerns. CCO's responsibilities include establishing, maintaining, and reviewing policies and procedures reasonably designed to ensure compliance with applicable Exchange Act requirements.[1315] Because such responsibilities apply to the entity as a whole and many of the requirements that the CCO oversees are entity-level requirements, the Commission believes that it is necessary to treat the CCO requirement as an entity-level requirement applicable to all of an SBS Entity's security-based swap business.[1316]

b. Transaction-Level Requirements for SBS Dealers

As noted above, the Commission is adopting final Rule 3a71–3(c) and amendments to the definitions in Rule 3a71–3(a) largely unchanged from the proposal. Accordingly, the final rule provides that registered SBS Dealers, with respect to their foreign business, shall not be subject to the requirements relating to business conduct standards described in Section 15F(h) of the Exchange Act,[1317] and the rules and regulations thereunder,[1318] other than the rules and regulations prescribed by the Commission pursuant to Section 15F(h)(1)(B).[1319] The final rule defines "foreign business" for both foreign SBS Dealers and U.S. SBS Dealers to mean any security-based swap transactions entered into, or offered to be entered into, by or on behalf of the SBS Dealer that do not include its U.S. business.[1320]

However, the final rule defines "U.S. business" differently for foreign SBS Dealers and U.S. SBS Dealers. The final rule defines "U.S. business" of a foreign SBS Dealer to mean (i) any transaction entered into, or offered to be entered into, by or on behalf of such foreign SBS Dealer, with a U.S. person (other than a transaction conducted through a foreign branch of that person), or (ii) any security-based swap transaction that is arranged, negotiated, or executed by personnel of the foreign SBS Dealer located in a U.S. branch or office, or by personnel of its agent located in a U.S. branch or office.[1321] For a U.S. SBS Dealer, the final rule defines "U.S. business" to mean "any transaction entered into or offered to be entered into by or on behalf of such U.S. security-based swap dealer, other than a transaction conducted through a foreign branch with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty." [1322] The Commission also is adopting, unchanged from the proposals, the definitions of "U.S. security-based swap dealer," [1323] and "foreign security-based swap dealer." [1324] The Commission also is adopting the definition of "foreign business," [1325] with minor edits to simplify the rule text primarily by eliminating unnecessary separate references to foreign SBS Dealers and U.S. SBS Dealers. Finally, the Commission is adopting Rule 3a71–3(c), which creates the exception from the application of the business conduct requirements to foreign business, again, unchanged from the proposal except for minor edits eliminating separate references to foreign SBS Dealers and U.S. SBS Dealers.

The final rule reflects the Commission's continuing view that all registered SBS Dealers should be required to comply with the transaction-level elements of the business conduct standards with respect to their U.S. business.[1326] The Dodd-Frank counterparty protection mandate focuses on the U.S. markets and participants in those markets.[1327] The business conduct standards are intended to bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require registered SBS Dealers to treat parties to these transactions fairly.[1328] Accordingly, with respect to both foreign and U.S. SBS Dealers, we are adopting a definition of "U.S. business" that encompasses those transactions that appear particularly likely to affect the integrity of the security-based swap market in the United States and the U.S. financial markets more generally or that raise concerns about the protection of participants in those markets.

With respect to foreign SBS Dealers, the Commission continues to believe that the final definition of "U.S. business" should generally encompass transactions with U.S. persons and transactions that the foreign SBS Dealer arranges, negotiates, or executes using personnel located in a U.S. branch or office.[1329] As we have previously noted, this approach would both preserve customer protections for U.S. counterparties that would expect to benefit from the protection afforded to them by Title VII of the Dodd-Frank Act and help maintain market integrity by subjecting the large number of transactions that involve relevant dealing activity in the United States to these requirements, even if both counterparties are non-U.S. persons.[1330]

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obligations concerning: (1) Monitoring of trading to prevent violations of applicable position limits; (2) establishing sound and professional risk management systems; (3) disclosing to regulators information concerning its trading in security-based swaps; (4) establishing and enforcing internal systems and procedures to obtain any necessary information to perform any of the functions described in Section 15F of the Exchange Act, and providing the information to regulators, on request; (5) implementing conflict-of-interest systems and procedures; and (6) addressing antitrust considerations such that the SBS Entity does not adopt any process or take any action that results in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing. *See* 15 U.S.C. 78o–10(j).

[1314] *See* Cross-Border Proposing Release, 78 FR 31014, *supra* note 6 (explaining that the purpose of the diligent supervision requirements is to prevent violations of applicable federal securities laws, and the rules and regulations thereunder, relating to an entity's entire business as a security-based swap dealer, which is not limited to either its foreign business or its U.S. business, but rather is comprised of its entire global security-based swap dealing activity, and as such, to be effective, the requirements should apply at the entity level).

[1315] *See* Section II.I, *supra.*

[1316] *See* Cross-Border Proposing Release, 78 FR 31014–15, *supra* note 6.

[1317] 15 U.S.C. 78o–10(h).

[1318] These rules and regulations are Rules 15Fh–1 through 15Fh–6. With the exception of Rule 15Fh–3(h), which prescribes certain entity-level requirements pursuant to Exchange Act Section 15F(h)(1)(B), these rules are transaction-level requirements, which is consistent with the proposed approach. *See,* supra, Section III.0.

[1319] *See* Rule 3a71–3(c).

Section 15F(h)(1)(B) requires registered security-based swap dealers to conform with such business conduct standards relating to diligent supervision as the Commission shall prescribe. *See* 15 U.S.C. 78o–10(h)(1)(B). The rules being prescribed pursuant to Exchange Act Section 15F(h)(1)(B) are those in Rule 15F–3(h), which are entity-level requirements, as discussed above. *See, supra,* Section III.0. The exception as adopted applies to Section 15F(h)(1)(A) of the Exchange Act, and any rules and regulations thereunder. However, this exception does not affect applicability of the general antifraud provisions of the federal securities laws to the activity of a foreign SBS Dealer. *See* Cross-Border Proposing Release, 78 FR 31016 n.476, *supra* note 6.

[1320] *See* Rule 3a71–3(a)(9).

[1321] *See* Rule 3a71–3(a)(8)(i).

[1322] Rule 3a71–3(a)(8)(ii).

[1323] *See* Rule 3a71–3(a)(6).

[1324] *See* Rule 3a71–3(a)(7).

[1325] *See* Rule 3a71–3(a)(9).

[1326] *See* U.S. Activity Proposing Release, 80 FR 27475, *supra* note 9.

[1327] *See* Cross-Border Proposing Release, 78 FR 31017–018, *supra* note 6.

[1328] *See id.* The rules require, among other things, that registered SBS Dealers communicate in a fair and balanced manner with potential counterparties and that they disclose conflicts of interest and material incentives to potential counterparties.

[1329] We also note that relying on the same approach to U.S. activity that is used in the *de minimis* context should simplify implementation of Title VII for market participants. *See* U.S. Activity Proposing Release, 80 FR 27473, *supra* note 9.

[1330] The exception from the definition for transactions involving the foreign branch of a U.S. person reflects our view that transactions between the foreign branch of a U.S. person and a non-U.S. person, in which the personnel arranging,

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With respect to U.S. SBS Dealers, the Commission continues to believe that the definition of "U.S. business" should encompass all of their transactions, regardless of the U.S.-person status of the counterparty, except for transactions that a U.S. SBS Dealer arranges, negotiates, or executes through a foreign branch with another foreign branch or with a non-U.S. person. As noted above, Title VII is concerned with the protection of U.S. markets and participants in those markets, and it remains our view that imposing these requirements on a U.S.-person dealer when it arranges, negotiates, or executes through its foreign branch with another foreign branch or a non-U.S. person would produce little or no benefit to U.S. market participants.[1331]

One commenter urged the Commission to return to its initially proposed approach to the definition of "transactions conducted within the United States," which would have looked to the location of relevant activity of both counterparties.[1332] Such an approach would thus apply the business conduct requirements fully to any transactions involving activity in the United States, not just dealing activity in the United States but also relevant activity carried out by a non-dealing counterparty in the United States. Given the structure of the security-based swap market and the concentration of security-based swap dealing among a small group of firms, the Commission believes the final rules are appropriately tailored to apply the business conduct requirements to dealing activity, including dealing activity in the United States, that is likely to raise market integrity and transparency concerns.[1333] Further, as the Commission discussed in the U.S. Activity Adopting Release, the final rules adopted in that release should mitigate some commenters' concerns regarding the costs associated with the initially proposed application of the *de minimis* exception to "transactions conducted within the United States." [1334] The initially proposed approach supported by the commenter would have required a dealer engaged in dealing activity to consider both the location of its personnel and the personnel of its counterparty in determining whether to include transactions in its *de minimis* calculation thresholds.[1335] The final rules in the U.S. Activity Adopting Release and the final rule being adopted here focus on the location of relevant personnel of only the dealer (or its agent), which should impose lower costs on market participants than the initially proposed approach, while applying the business conduct requirements to dealing activity in the United States that is likely to raise the types of concerns addressed by the business conduct requirements.[1336] Moreover, given the Commission's action in the U.S. Activity Adopting Release, taking a different approach in the definition of "U.S. business" would mean using a different test to identify relevant U.S. activity from the test used in the *de minimis* context. The Commission believes that this would present unnecessary implementation and compliance challenges.[1337]

Some commenters have argued that the business conduct standards should not apply to any transactions between two non-U.S. persons because the foreign counterparties may not expect to receive such protections, or to any such transactions where expectations of receiving such protections are likely to be particularly low.[1338] The Commission has determined not to limit the application of the business conduct standards in this way. Counterparty expectations are not particularly relevant in determining whether a transaction that involves relevant activity in the United States has the potential to affect the integrity of the U.S. markets, particularly given that all of the registered foreign SBS Dealers subject to these requirements will have, by definition, a sufficient level of activity in the U.S. security-based swap market to exceed the *de minimis* threshold, many by an order of magnitude.[1339] Given the significant role registered SBS Dealers play in the market, applying the business conduct requirements to their U.S. business should help protect the integrity of the U.S. market.[1340]

Moreover, the approach to identifying relevant dealing activity in the United States reflects the Commission's determination that focusing solely on the location of the personnel arranging, negotiating, or executing the transaction on behalf of the foreign SBS Dealer appropriately balances the regulatory objectives of the business conduct standards with concerns about workability of an activity-based test. To create additional exceptions, particularly for activity occurring in the United States, based on the expectations of the non-dealing counterparty or the mode of its interaction with the foreign SBS Dealer would unnecessarily complicate this approach in a manner, as noted above, that would not advance the regulatory objectives served by these standards.[1341]

Some commenters have urged the Commission to harmonize any standards that the Commission does impose on these transactions with requirements that may separately apply to the foreign registered SBS Dealer's U.S.-person intermediary to avoid unnecessary duplication or conflicts.[1342] The Commission

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negotiating, and executing the transaction are all located outside the United States, are less likely to affect the integrity of the U.S. market and reflects our consideration of the role of foreign regulators in non-U.S. markets. *See* Cross-Border Proposing Release, 78 FR 31017, *supra* note 6.

[1331] *See* Cross-Border Proposing Release, 78 FR 31018, *supra* note 6.

[1332] *See* note 1291, *supra* (citing Better Markets (July 2015), *supra* note 10).

[1333] *See* U.S. Activity Adopting Release, 81 FR 8624, n.241 (explaining that the U.S. activity test is appropriately tailored to capture dealing activity that raises the types of concerns addressed by the Title VII dealer regime).

[1334] *See* U.S. Activity Adopting Release, 81 FR 8627.

[1335] *See* Cross-Border Proposing Release, 78 FR 31000–01, *supra* note 6.

[1336] *See* U.S. Activity Adopting Release, 81 FR 8627.

[1337] *See also* U.S. Activity Proposing Release, 80 FR 27467, *supra* note 9 (discussing the change in approach in the context of the *de minimis* calculation from the Cross-Border Proposing Release, which proposed to focus both on the dealing and non-dealing counterparty, to the U.S. Activity Proposing Release, which proposed to focus only on the activity of personnel in the United States of the dealing counterparty).

[1338] *See* ICI Global (July 2015), *supra* note 10, at 2, 5–6; SIFMA–AMG (July 2015), *supra* note 10, at 2, 5 (stating that non-U.S. clients do not expect U.S. protections to apply to transactions between two non-U.S. persons). *See also* ISDA (July 2015), *supra* note 10, at 2 (urging that the Commission not apply the business conduct requirements to transactions solely because the transaction involves U.S. activity); ISDA (July 2015), *supra* note 10, at 7 (arguing that business conduct requirement, as well as other requirements, should not apply to transactions that are executed on an anonymous electronic platform or other means that "involve[s] no human contact within the United States," because the parties would have no expectation that the rules would apply to such a transaction).

[1339] *See* U.S. Activity Adopting Release, 81 FR 8623 (rejecting commenter concerns that counterparties would not expect automated electronic trades to be subject to *de minimis* counting).

[1340] *See* U.S. Activity Adopting Release, 81 FR 8616 and n.166 (explaining that overwhelming majority of transactions captured by U.S. Activity Test are likely to be inter-dealer transactions carried out between non-U.S. persons whose dealing activity likely exceeds the *de minimis* threshold by at least an order of magnitude).

[1341] To the extent that anonymously executed transactions raise specific challenges or concerns, these are not unique to transactions between two non-U.S. persons involving relevant dealing activity in the United States. The Commission has separately addressed this issue above. *See* Section II.B, *supra*.

[1342] Commenters urged the Commission to harmonize FINRA's existing sales practice requirements with the "communication-based" or transaction-specific rules applicable under Title VII. *See* SIFMA/FSR (July 2015), *supra* note 10, at 9–10; IIB (July 2015), *supra* note 10, at 13. Commenters also urged the Commission to work recognizes that business conduct standards could apply to transactions arising from relevant dealing activity in the United States, including Title VII and home jurisdiction requirements on the registered SBS Dealer and SRO requirements on the U.S. intermediary. As discussed above, the rules being adopted today are generally designed to be consistent with the relevant SRO requirements (and to harmonize with CFTC requirements), taking into account the nature of the security-based swap market and the statutory requirements for SBS Entities.[1343] The Commission does not believe that the commenters' concerns warrant a complete or partial exception from Title VII requirements for the registered SBS Dealer.

First, as discussed below, the Commission is adopting a rule that potentially would make substituted compliance available for the business conduct requirements following a substituted compliance determination by the Commission.[1344] Accordingly, substituted compliance, if available, could mitigate the commenters' concerns regarding home country regulation.[1345] A person relying on substituted compliance would remain subject to the applicable Exchange Act requirements, but could comply with those requirements in an alternative fashion.[1346] In practice, however, we recognize that there will be limits to the availability of substituted compliance. For example, it is possible that substituted compliance may be permitted with regard to some requirements and not others with respect to a particular jurisdiction. For certain jurisdictions, moreover, substituted compliance may not be available with respect to any requirements depending on our assessment of the comparability of the relevant foreign requirements, as well as the availability of supervisory and enforcement arrangements among the Commission and relevant foreign financial regulatory authorities. Although comparability assessments will focus on regulatory outcomes rather than rule-by-rule comparisons, the assessments will require inquiry regarding whether foreign regulatory requirements adequately reflect the interests and protections associated with the particular Title VII requirement. In some circumstances, such a conclusion may be difficult to achieve.

In the event that we are unable to determine that an entity may satisfy certain Title VII requirements via substituted compliance, we recognize that such persons may, as a result, be subject to requirements that are duplicative of particular Title VII requirements. While we recognize the significance of such a result, in our view compliance with the Title VII requirements is necessary to advance the policy objectives of Title VII. This would be undermined by permitting foreign dealers to comply with their Title VII obligations by satisfying foreign requirements, unless the alternative route provided by substituted compliance has been made available.

Second, although the Commission is mindful that the U.S. intermediary of a registered foreign SBS Dealer may be subject to business conduct requirements under the Exchange Act and relevant SRO rules and that such requirements may be similar in certain respects to those in Title VII,[1347] the Commission continues to believe that notwithstanding any requirements that may apply to such intermediaries, it is appropriate to impose the Title VII business conduct standards directly on registered foreign SBS Dealers when they use personnel located in the United States to arrange, negotiate, or execute security-based swaps, even with counterparties that are also non-U.S. persons.[1348] The Commission continues to believe that it is appropriate to subject all registered SBS Dealers engaged in U.S. business to the same business conduct framework, rather than encouraging a patchwork of business conduct protections under U.S. law that may offer counterparties varying levels of protections and limit the Commission's ability to pursue enforcement actions against the registered SBS Dealer for violation of Title VII depending on the business model that the registered SBS Dealer has chosen to use in its U.S. business.[1349]

Further, as we have previously discussed, Congress established a comprehensive framework of business conduct standards in Title VII that applies to registered SBS Dealers, and we continue to believe that the transactional requirements we adopt to implement this framework should govern their transactions with counterparties when such transactions raise market integrity, transparency, and counterparty protection concerns that are addressed by these requirements.[1350] As we have already noted, SBS Dealers are involved in an overwhelming majority of SBS transactions in the U.S., meaning that business conduct standards intended to achieve market

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toward a harmonized approach to all the business conduct rules with the CFTC and FINRA to ensure that security-based swap dealers and swap dealers are not subject to two different sets of business conduct requirements. *See also* ISDA (July 2015), *supra* note 10, at 2, n.7; IIB (July 2015), *supra* note 10, at 6, 7.

[1343] *See* Sections I.C and I.F, *supra*.

[1344] *See* Rule 3a71–6. *See also* note 1301, *supra* (citing IIB (July 2015), *supra* note 10, at 12).

[1345] *See* note 1338, *supra* (citing ICI Global (July 2015), *supra* note 10, at 5–6; SIFMA–AMG (July 2015), *supra* note 10, at 2, 5; IIB (July 2015), *supra* note 10, at 11; SIFMA/FSR (July 2015), *supra* note 10, at 9).

[1346] *See* Cross-Border Proposing Release, 78 FR 31085, *supra* note 6.

[1347] *See* U.S. Activity Proposing Release, 80 FR 27476 n.249, *supra* note 9 (stating that the agent of a foreign SBS Dealer would need to consider whether it separately would need to register as a security-based swap dealer (if, for example, the agent acted as principal in a security-based swap with the counterparty, and then entered into a back-to-back transaction with the booking entity), a broker (*e.g.*, by soliciting or negotiating the terms of security-based swap transactions), or other regulated entity); Cross-Border Proposing Release, 78 FR 31027 n.574, *supra* note 6 (same).

Commenters urged the Commission to harmonize FINRA's existing sales practice requirements with the "communication-based" or transaction-specific rules applicable under Title VII. *See* SIFMA/FSR (July 2015), *supra* note 10, at 9–10; IIB (July 2015), *supra* note 10, at 13. Commenters also urged the Commission to work toward a harmonized approach to all the business conduct rules with the CFTC and FINRA to ensure that security-based swap dealers and swap dealers are not subject to two different sets of business conduct requirements. *See* ISDA (July 2015), *supra* note 10, at 9; IIB (July 2015), *supra* note 10, at 6, 7.

[1348] *See* U.S. Activity Proposing Release, 80 FR 27476, *supra* note 9. Consistent with the Commission's position in the Cross-Border Proposing Release, the dealer and its agent(s) may choose to allocate the responsibility for compliance with all U.S. business conduct requirements in a manner consistent with its business structure, although the foreign security-based swap dealer would remain responsible for ensuring that all relevant Title VII requirements applicable to a given security-based swap transaction are fulfilled. *See* U.S. Activity Proposing Release, 80 FR 27476 n.249, *supra* note 9; Cross-Border Proposing Release, 78 FR 31026–27, *supra* note 6. This allocation, however, would not affect the non-U.S. person's responsibilities with respect to performing the *de minimis* calculations required under Rules 3a71–2 and 3a71–3(b). *See* U.S. Activity Proposing Release, 80 FR 27476 n.249, *supra* note 9; Cross-Border Proposing Release, 78 FR 31026–27 n.574, *supra* note 6.

[1349] *See* U.S. Activity Proposing Release, 80 FR 27476, *supra* note 9.

[1350] *See* U.S. Activity Adopting Release, Sections IV.B.2, IV.B.3, and n.162 (describing regulatory concerns raised by security-based swap dealing activity carried out in the U.S., including risk, market integrity and transparency, and counterparty protection). *See* Section II.G.3, *supra* (explaining that the "know your counterparty" standard would be consistent with basic principles of legal and regulatory compliance, and operational and credit risk management); Section II.G.2.e, *supra* (explaining that the daily mark disclosure requirement is directly relevant to a counterparty's understanding of its financial relationship under a security-based swap transaction and ensures a counterparty's ability to monitor the transaction during the relationship); Section II.G.4, *supra* (explaining that the suitability requirement enables security-based swap dealers to understand the risk-reward tradeoff of their security-based swap transactions).

integrity, transparency, and counterparty protection across the U.S. market in security-based swaps are more likely to achieve these objectives if they apply to all transactions that SBS dealers arrange, negotiate, or execute using personnel located in a U.S. branch or office.[1351]

Some commenters supported dividing the business conduct standards into two categories, one of which they argued should not apply to transactions between two non-U.S. persons. These commenters urged the Commission not to impose "relationship-based" requirements (which they defined to include rules relating to the counterparty's ECP status, "know your counterparty" requirements, daily mark disclosure, and suitability requirements) on these transactions but suggested that imposing "trade-specific" or "communication-based" requirements (which they which they identified as including disclosure of material risks and characteristics and material incentives or conflicts of interest and related recordkeeping, disclosures regarding clearing rights and related recordkeeping, product suitability, and fair and balanced communications and supervision) could be a reasonable approach, particularly if they were made more consistent with similar FINRA rules that may apply to the U.S. intermediary.[1352]

The Commission does not agree with commenters who argue that the foreign SBS Dealers should be excepted from the "relationship-based" requirements when entering into transactions with other non-U.S. persons.[1353] The Commission believes that applying each of these requirements should improve market integrity and enhance transparency and counterparty protections, even if that dealing activity is entirely with non-U.S.-person counterparties, particularly given that the foreign SBS Dealers that engage in the relevant dealing activity in the United States at levels above the *de minimis* threshold account for a significant proportion of transactions in the U.S. market. Moreover, certain underlying substantive requirements may require SBS Dealers to obtain representations from counterparties (or to otherwise confirm their status) even absent these business conduct requirements, meaning that, as a practical matter, for example, we would not expect that the requirement in Rule 15Fh–3(a)(1) to verify ECP status would increase the burden on market participants.[1354] Accordingly, the Commission does not believe it would be appropriate to provide an exception from these "relationship-based" requirements for foreign SBS Dealers when they are required to comply with the business conduct standards in a security-based swap transaction with a non-U.S.-person counterparty because they have used personnel located in the United States to arrange, negotiate, or execute the transaction.

The Commission recognizes that some non-U.S. person counterparties may express reservations about making certain representations or completing questionnaires to comply with the "relationship-based" business conduct requirements when they have no intention of interacting with the dealer's personnel located in the United States.[1355] At the same time, nothing in the rule requires a registered SBS Dealer to comply with these requirements if it intends to engage in transactions with a counterparty solely as part of its foreign business. If the relationship later develops in such a way that future transactions may be expected to be part of the SBS Dealer's U.S. business, under the final rules the SBS Dealer then would be required to comply with these business conduct standards, including these "relationship-based" requirements.

As noted above, some commenters acknowledged that the "communication-based" or "trade-specific" requirements likely would advance regulatory objectives, such as the prevention of fraud or manipulation, even in connection with SBS transactions between two non-U.S. persons where one counterparty is using personnel located in the United States to arrange, negotiate, or execute transactions.[1356] They urged, however, that the Commission harmonize its Title VII business conduct standards to existing FINRA rules to the extent that it chooses to impose Title VII requirements on these transactions.[1357] As discussed above, the rules being adopted today are generally designed to be consistent with the relevant SRO requirements (and to harmonize with CFTC requirements), taking into account the nature of the security-based swap market and the statutory requirements for SBS Entities.[1358]

The Commission recognizes that application of these requirements may impose costs on asset managers servicing non-U.S. clients and impede their ability to execute certain block trades.[1359] However, we believe that the rules appropriately balance the regulatory objectives of the business conduct rules with concerns for a workable approach. The rules adopted here are generally applicable to transactions of registered SBS Dealers; the rules do not apply directly to asset managers, and asset managers will incur no liability under these rules. We recognize that SBS Dealers may arrange their business in a variety of ways and may have certain expectations of asset managers in connection with the transactions involving funds. The entities involved in the transaction may allocate these costs in the manner most efficient for the counterparties to the transactions. Although the Commission recognizes that, depending on how the SBS Dealer and the asset manager choose to allocate these responsibilities, the asset manager may incur certain costs, neither these private allocation issues nor the potential liquidity or execution price concerns change the Commission's view that the U.S. business of SBS Dealers should be subject to these business conduct requirements.

[1351] Firms that act as dealers play a central role in the security-based swap market. Based on an analysis of 2014 single name CDS data in TIW, dealer accounts of those firms that are likely to exceed the *de minimis* thresholds and trigger registration requirements intermediated transactions with a gross notional amount of approximately $8.5 trillion, over 60% of which was intermediated by top 5 dealer accounts. Commission staff analysis of TIW transaction records indicates that approximately 99% of single name CDS price-forming transactions in 2014 involved an ISDA-recognized dealer. *See* U.S. Activity Adopting Release, 81 FR 8606 n.77.

[1352] *See* notes 1297–1299, *supra*.

[1353] *See* note 1298, *supra*.

[1354] The Exchange Act prohibits any person from effecting a security-based swap with a non-ECP unless the security-based swap is effected on a national securities exchange and the Securities Act makes it unlawful to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant unless a registration is in effect. *See* Section II.G.1.c, *supra*. *See also* Section 6(l) of the Exchange Act; Section 5(e) of the Securities Act. Accordingly, section 6(l) is broader than the activity covered by Rule 15Fh–3(a)(1), and the SBS Dealer has an independent obligation under section 6(l) even absent the requirement in Rule 15Fh–3(a)(1), to perform some due diligence in confirming that its counterparty is an ECP. The requirement to verify the ECP-status of a counterparty pursuant to Rule 15Fh–3(a)(1) simply provides a means for complying with certain of the relevant substantive statutory provisions. *See id*. *See* Section II.G.1.c, *supra*.

[1355] *See* SIFMA/FSR (July 2015), *supra* note 10, at 8–9. *See also* ICI Global (July 2015), *supra* note 10, at 6 (noting that, even though the registered dealer (and not the non-U.S. person) is subject to the business conduct requirements, the non-U.S. person counterparty would likely need to have in place appropriate documentation and representations if its dealer is subject to business conduct requirements, which may cause interruptions in their investment activities); IIB (July 2015), *supra* note 10, at 11–12 (arguing that non-U.S. counterparties would not expect the "trade-relationship" requirements to apply in their trades with non-U.S. persons and would be surprised to be required to agree to covenants or fill out questionnaires related to U.S. requirements). *See* note 1298, *supra*.

[1356] *See* note 1299, *supra*.

[1357] *See* note 1300, *supra*.

[1358] *See* Sections I.C and I.F, *supra*.

[1359] *See* notes 1295 and 1296, *supra*. Specifically, the commenters expressed concern that, under the proposal, the U.S. asset manager executing a trade on behalf of a non-U.S. client, including in the context of a block trade, would need to know whether the transaction involved U.S. activity and would also need to verify that the non-U.S. client satisfies the business conduct requirements. *See* SIFMA–AMG (July 2015), *supra* note 10, at 4; ICI Global (July 2015), *supra* note 10, at 6 (explaining that regulated fund parties would need appropriate documentation and representations in place to execute such trades and would face interruptions in investment activities in doing so).

The Commission also disagrees with the commenters that urged the Commission to permit sophisticated counterparties to "opt-out" completely from the business conduct standards and with commenters that requested that the U.S. Activity Test not be applied to transactions with special entities.[1360] The Commission has considered the concerns raised by commenters and determined, on balance, not to permit counterparties to opt out of the protections provided by the business conduct rules. The rules are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections and so do not think it appropriate to permit parties to "opt out" of the benefits of those provisions.[1361]

c. Transaction-Level Requirements for Major SBS Participants

As noted above, the Commission is also adopting amendments to Rule 3a67–10 to incorporate a modified exception from the business conduct standards for registered foreign Major SBS Participants.[1362] The Commission received no comments in response to the proposed exception from the business conduct requirement for registered foreign Major SBS Participants in their transactions with non-U.S. persons. However, the final rule is slightly modified from the proposal to address the concerns that non-U.S. persons would limit or stop trading with foreign branches of U.S. banks that led us to adopt a similar exception in the Cross-Border Adopting Release for certain transactions from the position threshold calculations to determine whether one is a Major SBS Participant.[1363]

As proposed, Exchange Act Rule 3a67–10(c), which addressed cross-border application of the definition of "major security-based swap participant," would require non-U.S. persons to count toward the Major SBS Participant thresholds only their security-based swap transactions with U.S. persons and would have permitted no exception from that requirement. As adopted, however, in the Cross-Border Adopting Release, the relevant rule (Exchange Act Rule 3a67–10(b)) provides that a non-U.S. person need not include in these threshold calculations its security-based swap positions with a U.S. person to the extent that the positions "arise from transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered SBS Dealer."[1364] This change to the final rule made the Commission's approach to the threshold calculations for Major SBS Participant consistent with its final approach to the SBS Dealer *de minimis* calculation thresholds under Exchange Act rule 3a71–3(b)(1)(iii)(A)(*1*), which also permitted non-U.S. persons to exclude such transactions with U.S. persons from their *de minimis* threshold calculations.[1365] The Commission noted that this expanded exception from counting certain security-based swap positions towards a non-U.S. person's Major SBS Participant thresholds should help mitigate concerns that non-U.S. persons will limit or stop trading with foreign branches of U.S. banks.[1366]

The Commission believes similar concerns about the ability of foreign branches of U.S. banks to do business with non-U.S. persons apply in the context of application of the business conduct requirement to these transactions. This exception from the application of the business conduct requirements adopted in the final rules today should address concerns that non-U.S. persons would limit or stop trading with foreign branches of U.S. banks. The Commission is therefore amending Exchange Act rule 3a67–10 to incorporate exceptions for transactions through the foreign branch of a U.S. person modeled on those that are available in the final rule as it applies to registered SBS Dealers.[1367] Accordingly, the final rules except registered foreign Major SBS Participants from the business conduct standards described in section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B))[1368] with respect to any transaction with a non-U.S. person, as proposed, or with a U.S. person in a transaction conducted through the foreign branch of the U.S. person.[1369] The final rules also except a registered U.S. Major SBS Participant from the business conduct standards described in section 15F(h) of the Exchange Act, and the rules and regulations thereunder (other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B))[1370] with respect to any transaction of the registered U.S. Major SBS Participant that is a transaction conducted through a foreign branch with a non-U.S. person, or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty.[1371]

[1360] *See* IIB (July 2015), *supra* note 10, at 13; SIFMA/FSR (July 2015), *supra* note 10, at 10–11 (requesting the non-U.S. counterparty have option to opt-out of "transaction-specific" rules if they apply solely as a result of U.S. activity). *See* note 1302, *supra*. *See* note 1304 (*citing* IIB (July 2015), *supra* note 10, at 12; SIFMA/FSR (July 2015), *supra* note 10, at 9–10).

[1361] *See* Section II.A.3, *supra*. We also explained above that, while we are not adopting an opt out provision, as discussed in connection with the relevant rules, the Commission has determined to permit means of compliance with the final rules that should promote efficiency and reduce costs (*e.g.*, Rule 15Fh–1(b) (reliance on representations)) and, where appropriate, allow SBS Entities to take into account the sophistication of the counterparty (*e.g.*, Rule 15Fh–3(f) (regarding recommendations of security-based swaps or trading strategies)).

[1362] Rule 3a67–10(d).

[1363] *See* Rule 3a67–10. *See* Cross-Border Adopting Release, 79 FR 47343, *supra* note 193 (explaining the Commission's view that an exclusion from the counting requirement for positions that arise from transactions conducted through foreign branches of registered security-based swap dealers appropriately accounts for the risk in the U.S. financial system created by such positions).

[1364] *See* Exchange Act rule 3a67–10(b)(3)(i)(A).

[1365] *See* Cross-Border Adopting Release, 79 FR 47343, *supra* note 193.

[1366] *See id.*

[1367] *See* Exchange Act rule 3a71–3(a)(8)(i)(A) (excluding from the definition of "U.S. business" of a foreign SBS Dealer any transaction with U.S. persons that constitutes a transaction conducted through a foreign branch of that U.S. person); Exchange Act rule 3a71–3(a)(8)(ii) (excluding from the definition of "U.S. business" of U.S. SBS Dealers any transaction of the U.S. SBS Dealer that is a transaction conducted through a foreign branch with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty).

[1368] *See, supra,* notes 1318–1319.

[1369] *See* Exchange Act rule 3a67–10(d)(1). Consistent with the Cross-Border Proposing Release, the Commission is also amending Exchange Act rule 3a67–10(a) to define "foreign major security-based swap participant." *See* Exchange Act rule 3a67–10(a)(6).

[1370] *See, supra,* notes 1318–1319.

[1371] *See* Exchange Act rule 3a67–10(d)(2). The Commission is also amending Exchange Act rule 3a67–10(a) to define "U.S. major security-based swap participant." *See* Exchange Act rule 3a67–10(a)(5).

B. Availability of Substituted Compliance

1. Proposed Substituted Compliance Rule

As part of the Cross-Border Proposing Release, the Commission proposed to make substituted compliance potentially available in connection with the requirements applicable to SBS Dealers pursuant to Exchange Act Section 15F, other than the registration requirements applicable to dealers.[1372] Because the business conduct requirements being adopted today are grounded in Section 15F, substituted compliance generally would have been available for those requirements under the proposal.

The proposal would have specifically provided that a foreign SBS Dealer[1373] could satisfy applicable requirements under Section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.[1374] The Commission explained that a person relying on substituted compliance would remain subject to the applicable Exchange Act requirements, but could comply with those requirements in an alternative fashion. Failure to comply with the applicable foreign requirement would mean that the person would be in violation of the requirement in the Exchange Act.[1375]

The Commission further explained that allowing substituted compliance for the dealer requirements would have the goal of increasing the efficiency of the security-based swap market and promoting competition "by helping to avoid subjecting foreign security-based swap dealers to potentially conflicting or duplicative compliance obligations, while still achieving the policy objectives of Title VII." The Commission also stated that such an approach would be consistent with the global nature of the security-based swap market, and may be less disruptive of business relationships than not permitting substituted compliance.[1376]

Under the proposal, the Commission would not permit dealer requirements to be satisfied by substituted compliance unless the Commission determined that the foreign regime's requirements were comparable to the otherwise applicable requirements, after taking into account such factors as the Commission determines are appropriate, including the scope and objectives of the relevant foreign regulatory requirements and the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign financial regulatory authority in support of its oversight.[1377]

The Commission also stated that in making a substituted compliance determination, it would focus on the similarities in regulatory objectives, rather than requiring that the foreign jurisdiction's rules be identical. Moreover, depending on the assessment of comparability, the Commission could condition the substituted compliance determination by limiting it to a particular class or classes of registrants in the foreign jurisdiction.[1378]

The proposal would have required that, prior to making a substituted compliance determination, the Commission must have entered into a supervisory and enforcement memorandum of understanding ("MOU") or other arrangement with the foreign authority addressing the oversight and supervision of security-based swap dealers subject to the substituted compliance determination.[1379] The proposal further provided for the potential withdrawal of substituted compliance orders, after notice and comment.[1380] In addition, the proposal would have required that a foreign security-based swap dealer could not submit a substituted compliance request unless it is directly supervised by the foreign financial regulatory authority, and the security-based swap dealer provides a certification and opinion of counsel that the security-based swap dealer can provide the Commission with prompt access to its books and records, and that the security-based swap dealer as a matter of law can submit to onsite inspection and examination by the Commission.[1381]

Under the proposal, substituted compliance would not have been available to Major SBS Participants. In this regard, the Commission particularly noted "the limited information currently available to us regarding what types of foreign entities may become major security-base swap participants, if any, and the foreign regulation of such entities."[1382]

2. Comments on the Proposal

Commenters raised issues in connection with a variety of aspects regarding the proposed substituted compliance rule:

- *Basis for substituted compliance.* One commenter to the Cross-Border Proposing Release questioned the Commission's authority to grant substituted compliance,[1383] and expressed skepticism regarding the policy basis for permitting the use of substituted compliance to satisfy Title VII requirements.[1384] That commenter further suggested that any Commission relief should be used sparingly, and should be predicated on a finding that there is an actual conflict between Title VII and foreign requirements.[1385]

[1372] *See* Cross-Border Proposing Release, 78 FR at 31088, 31207–08, *supra* note 6 (proposed Exchange Act Rule 3a71–5).

[1373] In the Cross-Border Proposing Release, the Commission proposed to define a "foreign security-based swap dealer" as a security-based swap dealer that is not a U.S. person. *See* 78 FR at 31206, *supra* note 6 (proposed Exchange Act Rule 3a71–3(a)(3)).

[1374] *See* Cross-Border Proposing Release, 78 FR at 31207, *supra* note 6 (proposed Exchange Act Rule 3a71–5(b), providing that a security-based swap dealer may comply with Section 15F requirements by complying with certain corresponding foreign requirements).

[1375] *See id.* at 31085.

[1376] *See id.* at 31089–90.

[1377] *See id.* at 31086–88.

[1378] *See id.* at 31088. The Commission added that it intended to take a category-by-category approach toward substituted compliance under the proposal, and that "certain requirements are interrelated such that the Commission would expect to make a substituted compliance determination for the entire group of related requirements." *See id.* at 31088–89 (further stating that the Commission anticipated considering substituted compliance related to capital and margin requirements in connection with requirements related to risk management, recordkeeping and reporting, and diligent supervision).

[1379] *See id.* at 31088.

[1380] *See id.* at 31089 (citing as an example changes in the foreign regulatory regime or a foreign regulator's failure to exercise its supervisory or enforcement authority in an effective manner).

[1381] *See id.* at 31089 & n.1126.

[1382] *See id.* at 31035–36.

[1383] *See* Better Markets (August 2013), *supra* note 7, at 24 ("Nowhere does the SEC address its authority for adopting such a framework, nor does it explain how the possibility of 'conflicting or duplicative compliance obligations' [justifies] supplanting Congress's determination that, to protect the American taxpayer and economy, those subject to the Commission's jurisdiction must comply with the actual provisions of the Dodd-Frank financial reform law.").

This commenter particularly described the use of substituted compliance as constituting an impermissible exemption from the Title VII requirements, stating: "Had Congress intended the SEC to permit compliance with foreign regulation to suffice for all Title VII regulation of entities under U.S. jurisdiction, directly or by way of anti-evasion regulations, it certainly could have done so." In support, the commenter cited Exchange Act section 17A(k), 15 U.S.C. 78q–1(k), added by Dodd-Frank, which specifically permits the Commission to exempt clearing agencies from registration when they are subject to comparable and comprehensive oversight by the CFTC or by foreign regulators. *See* Better Markets (August 2013), *supra* note 7, at 25.

[1384] *See* Better Markets (August 2013), *supra* note 7, at 24–25 ("The SEC's duty is to protect investors and the public consistent with congressional policy, not to minimize the costs, burdens, or inconvenience that regulation imposes on industry. This is particularly important when any claimed industry burden is not only self-serving, but without basis and entirely speculative."). The commenter also alluded to potential loopholes associated with opportunities for regulatory arbitrage, encouraging "a race to the regulatory bottom so that financial firms can increase profits by avoiding regulations that protect the American people and taxpayers," and that the "financial industry is among the most notorious business sectors for searching the globe to exploit such loopholes." *See id.*

- *Availability to U.S. persons.* One commenter suggested that substituted compliance for the dealer requirements should be available to foreign branches of U.S. persons,[1386] while another commenter opposed the availability of substituted compliance to U.S. persons.[1387] One commenter expressed the view that substituted compliance should be made available to U.S. persons in connection with transactions with non-U.S. persons,[1388] while another stated that substituted compliance should be made available to U.S. persons in connection with all transaction-level requirements.[1389]
- *Availability in connection with U.S. business.* One commenter expressed the view that substituted compliance generally should not be available in connection with transactions involving U.S. counterparties, or in connection with transactions that occur within the U.S.[1390]
- *Comparability criteria.* Certain commenters opposed the proposed holistic approach toward assessing comparability based on regulatory outcomes, and instead expressed the view that any assessments should be done on a requirement-by-requirement basis.[1391] Conversely, a number of commenters supported the proposed approach.[1392] Some commenters requested further clarity regarding the assessment criteria and regarding the information that should be submitted in support of applications,[1393] while one commenter challenged the proposal's lack of particularized elements for assessing comparability in connection with certain requirements.[1394] One commenter questioned how the Commission would be notified of material changes to foreign law that underpins a substituted compliance determination.[1395] Commenters also expressed the views that regulatory comparisons should focus on common principles associated with shared G–20 Leaders goals,[1396] urged the need for consistency and coordination with the work of other regulators and IOSCO,[1397] and supported building on existing cooperative initiatives.[1398] Commenters

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[1385] *See* Better Markets (August 2013), *supra* note 7, at 26 ("Rather than following a substituted compliance approach, the SEC should use its exemptive authority sparingly, and only upon a finding of actual conflict with a particular foreign regulation.").

[1386] *See* SIFMA (August 2013), *supra* note 7, at A–33 (stating that not allowing substituted compliance for foreign branches in connection with confirmation requirements and certain other requirements would put foreign branches at a competitive disadvantage to foreign dealers, although foreign branches "are, in most cases, subject to extensive supervision and oversight in their host country"; further noting that the Commission proposed to allow substituted compliance for foreign branches in connection with regulatory reporting, public dissemination and trade execution requirements).

[1387] *See* Better Markets (August 2013), *supra* note 7, (generally opposing substituted compliance for U.S. persons, including foreign branches, and stating that allowing substituted compliance in those circumstances would constitute "carve-outs" that would "essentially nullify U.S. law in favor of foreign regulatory requirements").

[1388] *See* ESMA, *supra* note 8, at 3–4 (expressing the view that "substituted compliance should apply when a counterparty to the derivative transaction is established in an equivalent jurisdiction and is a non-U.S. person. In such case, substituted compliance should be possible whatever the status of the other party is, including if it is a U.S. person, and whatever the place out of which the transaction is conducted or executed.").

[1389] *See* MFA/AIMA, *supra* note 8 (stating the Commission should extend substituted compliance to "to all transaction-level requirements that apply to U.S. and non-U.S. persons," and that "by extending the scope of substituted compliance to all market participants, irrespective of their 'U.S. person' status, and to all regulatory categories . . . the Commission would mitigate the risk of duplicative and/or conflicting regulatory requirements, without curtailing the reasonable application of Title VII of Dodd-Frank to relevant market participants").

[1390] *See* Better Markets (August 2013), *supra* note 7, at 26–27 ("The SBS activities of a U.S. person directly and immediately impact the United States and endanger the U.S. taxpayer if improperly regulated . . . . Substituted compliance is simply impermissible for transactions with U.S. persons or for transactions that occur within the United States, regardless of the status of the counterparty.").

[1391] *See* AFR (stating that an "'outcomes-based' assessment of regulation is thus likely to be far more subjective than a careful, point-by-point comparison of the actual substance of the rules," and that "a hypothesized similarity in outcomes for sets of rules that are quite different in substance should not suffice to certify comparability"; further stating that an outcomes-based assessment may not be consistent with the need for different sets of requirements to be standardized); Better Markets, *supra* note 7, (August 2013) at 3, 30 (stating that the SEC must abandon the regulatory outcomes test and must ensure that foreign regulation is comparable in substance, form, over time, and as enforced," and also questioning whether "one can ever predict whether regulatory outcomes will be comparable").

A legislative comment letter to the CFTC in connection with the CFTC's own cross-border initiative, on which the SEC Chair and Commissioners were copied, also took the view that there should be a presumption against comparability for substituted compliance purposes and that any assessment be made on a requirement-by-requirement basis. *See* U.S. Senators, *supra* note 8 ("However, the 'substituted compliance' determination must be made through a judicious process, on a country-by-country and requirement-by-requirement basis, and subject to a presumption that other jurisdictions do not comply unless proven otherwise.").

[1392] *See, e.g.,* SIFMA (August 2013), *supra* note 7, at A–30 (the proposed approach "is consistent with the goal of international comity and is preferable to a rule-by-rule comparison"); IIB (August 2013), *supra* note 8, at 18 ("We agree with the Commission that requirements related to internal controls (such as risk management, recordkeeping and reporting, internal systems and controls, diligent supervision and chief compliance officer requirements) should generally be evaluated holistically. These requirements are commonly overseen and administered by a single prudential regulator."); EC, *supra* note 8 ("We support the consideration of regulatory outcomes as the standard for permitting substituted compliance, as well as the consideration of particular market practices and characteristics in individual jurisdictions. This flexible approach recognises the differing approaches that regulators and legislators may take to achieving the same regulatory objectives in the derivatives markets."); ABA (October 2013), *supra* note 8.

[1393] *See* SIFMA (August 2013), *supra* note 7 (requesting that the Commission provide a "more granular and detailed framework" for clarity regarding the assessment process, including the factors relevant to the determination and the method and metrics for comparing regulatory outcomes); CDEU, *supra* note 8 (addressing vagueness in criteria); ISDA (August 2013), *supra* note 7, at 3 ("Without a more concrete definition of the outcomes-based standard, applicants will face uncertainty in determining what information should be supplied in connection with an application. ISDA proposes that the appropriate 'outcomes' to guide substituted compliance determinations should be the common principles based on the consensus G–20 goals as described above, rather than details of domestic legislation; in other words, a substituted compliance determination should be an assessment that the non-US regulatory approach under consideration adheres to the common principles."); FOA, *supra* note 8 (requesting additional detail regarding relevant regulatory outcomes).

[1394] *See* Better Markets (August 2013), *supra* note 7, at 30 (noting that the Commission proposed particularized comparability elements in connection with regulatory reporting and public dissemination requirements, and stating that the lack of such elements for other requirements would be confusing and would create "the opportunity for the Commission to approve much more relaxed foreign regulations based on more vague standards"; further stating that it would be arbitrary and capricious not to make use of "consistently robust and publicly disclosed" standards to guide substituted compliance determinations for each requirement).

[1395] *See* Better Markets (August 2013), *supra* note 7, at 29 ("Any entity making use of substituted compliance must be held responsible for immediately informing the SEC if either the relevant regulation or the factors that qualified the entity for substituted compliance change in any material way.").

[1396] *See* ISDA (August 2013), *supra* note 7 (stating that "the Commission could consider and adopt a regime-based approach, whereby comparability would exist if a jurisdiction has implemented regulations to meet the G–20 commitments. The Commission's rejection of this approach based on its 'responsibility to implement the specific statutory provisions . . . added by Title VII' overlooks the principle that comity should inform the extraterritorial application of statutory directives"; citation omitted).

[1397] *See* II.F, *supra* note 8 ("Nevertheless, the proposed approach (and any similar approaches used in other jurisdictions) will be even more effective and beneficial if they are consistent with, and coordinated with, the work and approaches of other authorities in the same jurisdiction (particularly in the case where multiple supervisors have responsibility for swaps regulation), national authorities in other jurisdictions and international standard setters such as the International Organization of Securities Commissions (IOSCO).").

[1398] *See* JSDA, *supra* note 8 (noting that the CFTC and the European Union had announced a "Path Forward" regarding their joint understandings for how to approach cross-border derivatives, and stating "[w]e expect that the SEC and CFTC will jointly adopt the same approach regarding application of substituted compliance to Japan").

also stated that the Commission should coordinate substituted compliance determinations with the CFTC.[1399] One commenter expressed concern regarding operational complexities that may be associated with "partial" substituted compliance determinations, and suggested that there be presumptions against such partial determinations.[1400]

- *Enforcement and supervisory practices.* One commenter expressed the view that a substituted compliance assessment must address a foreign regime's supervisory and enforcement capabilities in practice.[1401] Another commenter expressed the view that differences among the supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.[1402] One commenter requested guidance regarding how the Commission would consider such enforcement and supervisory practices.[1403]

- *Multi-jurisdictional issues.* One commenter raised questions regarding the application of substituted compliance in connection with third-country branches of non-U.S. dealers,[1404] while another commenter raised issues regarding which sets of rules apply to transactions between parties in different markets, and whether the parties to cross-jurisdiction transactions may choose which rules apply.[1405] Commenters also raised issues regarding the assessment of substituted compliance in the context of the European Union, stating that certain rules are adopted at a European level and are applied directly in individual member states.[1406]

- *Deference and coordination.* One commenter suggested that the Commission should defer to non-U.S. oversight when possible.[1407] Commenters further questioned the proposed requirement that an applicant for substituted compliance certify that the Commission can access the firm's books and records and conduct onsite inspections of the firm.[1408] One commenter expressed the view that the Commission's ability to access the books and records of, and inspect, a dealer relying on substituted compliance should be subject to agreement with a foreign jurisdiction.[1409]

[1399] *See, e.g.,* CDEU, *supra* note 8 ("The SEC should also work closely with the CFTC when determining whether substituted compliance is applicable with respect to a particular jurisdiction. With respect to substituted compliance, the regulatory requirements of end-users operating globally depend on whether the SEC has made a comparability determination for the relevant non-U.S. jurisdiction. Conflicting regimes will lead to increased costs and unnecessary duplicative regulations which may be directly or indirectly imposed on derivatives end users."); ISDA (August 2013), *supra* note 7 ("Differences in the Commission's and CFTC's approaches to derivatives regulation produce uncertainties and confusion for market participants. Moreover, the lack of coordination severely limits potential efficiencies in the substituted compliance process. We note here some of the significant differences between the Proposal and the CFTC July 2013 Guidance. We respectfully urge the agencies to prioritize harmonization of their approaches to substituted compliance."). *But see* ISDA (August 2013), *supra* note 7 (commending the Commission's proposal "to allow substituted compliance by bona fide non-U.S. SBS dealers for external business conduct standards and conflicts of interest duties in transactions with U.S. persons," in contrast to the approach set forth in the CFTC's cross-border guidance).

[1400] FOA, *supra* note 8 (urging the Commission to be sensitive to "the possible consequences of 'partial' substituted compliance determination for market participants and, wherever possible, to presume that where a significant portion of a jurisdiction's regulatory regime is determined to be comparable to Title VII of the Dodd-Frank Act, the remainder of the jurisdiction's regulatory regime should also be deemed to be comparable").

[1401] This commenter also highlighted particular factors for analysis of foreign supervision and enforcement. *See* Better Markets (August 2013), *supra* note 7, at 29–31 (stating that the "foreign regulatory regime must incorporate strong investigative tools and meaningful penalty provisions, and the foreign regulator must have a demonstrable commitment to enforcement and the resources to carry out such a commitment," that the Commission "must evaluate a host of factors regarding the foreign regulatory system, including staff expertise, agency funding, agency independence, technological capacity, supervision in fact, and enforcement in fact," and that the Commission "must determine that there is a track record of robust enforcement by the foreign jurisdiction before making or renewing any such finding").

Another commenter more generally supported the Commission's ability to not grant substituted compliance due to the substantive enforcement of foreign regulatory regimes. *See* AFR, *supra* note 8 (also supporting withdrawal of substituted compliance due to a foreign regulator's failure to exercise its supervisory or enforcement authority).

[1402] *See* ISDA (August 2013), *supra* note 7 ("While the G–20 commitments for the reform of derivatives markets are globally shared, supervisory practices vary significantly among jurisdictions. Supervisory practices established in one jurisdiction will be adapted to the facts of that jurisdiction. This lack of commonality should not be assumed to be a defect in supervisory standards; common objectives may be reached through differing means. Moreover, commonality may not present meaningful benefits beyond those already achieved by virtue of the Commission and its counterpart regulators negotiating and entering into memoranda of understanding, a process that is separately a predicate for substituted compliance.").

[1403] *See* ABA, *supra* note 8 ("In addition, we believe that the Commission's comparability analysis should extend to the existence and effectiveness of the foreign jurisdiction's supervisory examination and enforcement programs. However, we urge the Commission to provide further guidance as to how these factors will be analyzed in particular scenarios.").

[1404] *See* FOA, *supra* note 8 ("However, multi-jurisdictional scenarios are quite common and the SEC must provide additional guidance on how it intends to address substituted compliance when a bank headquartered in one country (*e.g.,* the UK) may have a swap dealing branch that operates in another country (*e.g.,* Hong Kong). Any substituted compliance determination by the SEC must account for the interplay of the regulatory regimes in the relevant non-U.S. jurisdictions.").

[1405] *See* IIF, *supra* note 8 ("A further general observation is that while the rule proposal provides for substituted compliance covering significant aspects of entity-level and transaction-level requirements, it does not seem to address the issue of whose rules govern when the transaction is between two or more parties in different markets. It is important that the SEC provide guidance as to how one determines the applicable requirements in such cases. We suggest that the final rule should clarify that if the SEC has concluded on the basis of its outcomes-based assessment that the rules of the host country where the counterparties are located produce comparable outcomes to those in the United States, then either the parties should be free to choose which rules apply or the rules where the [transaction] occurs should be the default position.").

[1406] *See* ESMA, *supra* note 8 ("ESMA considers it is important that substituted compliance is assessed at the level of the jurisdiction, *i.e.* at the level of the Union, for Europe. EMIR rules are adopted at European level and apply directly in each Member State"); FOA, *supra* note 8, at 5 ("It is not clear how the SEC intends to approach situations where more than one non-U.S. jurisdiction's rules may be relevant. To some extent, these risks may be mitigated in the European Union to the extent that the SEC makes a substituted compliance determination on an EU-wide basis.").

[1407] *See* ISDA (August 2013), *supra* note 7, at 6–7 ("In order to minimize the burden of duplicative inspection requests, the Commission should defer to the maximum extent possible to oversight by the non-U.S. regulatory authorities. Such an approach would recognize the inherent limitations on the Commission's capability to interpret non-U.S. regulation and determine whether conduct is compliant.").

[1408] *See* ISDA (August 2013), *supra* note 7, at 6 ("ISDA requests that the Commission articulate a clear rationale for the inspection powers stipulated in footnote 1126 of the Proposal, as well as a set of principles setting forth how such powers would be used."); ESMA, *supra* note 8 ("The objective of substituted compliance and the necessary cooperation of the non-U.S. authorities that accompany such a determination should not be pre-empted by an invasive approach based on direct access to all books and records and on-site inspections which are not conducted in a coordinated manner with the home jurisdiction competent authority."). The underlying part of the Cross-Border Proposing Release discussed how the proposing release for the registration requirement would require that nonresident security-based swap dealers provide the Commission with an opinion of counsel concurring that as a matter of law the firm may provide the Commission with prompt access to the firm's books and records, and submit to onsite inspection and examination by the Commission. *See* Cross-Border Proposing Release, 78 FR at 31089 n.1126, *supra* note 6. The Commission has since adopted that requirement. *See* Registration Adopting Release, 80 FR at 48981, *supra* note 989.

[1409] *See* FOA, *supra* note 8 ("The FOA believes that the SEC's access to the books and records of, and the right to conduct on-site examinations and inspections of, a non-U.S. security-based swap dealer relying on a substituted compliance determination should be subject to the terms of the relevant Memorandum of Understanding (or other agreement) governing such substituted compliance arrangements. The FOA therefore urges the SEC to clarify in its final cross-border rules that, as part of a substituted compliance determination, the SEC agrees to access books and records, and conduct on-site examinations and inspections, of non-U.S.

- *Implementation and phase-in periods.* Some commenters suggested that certain requirements be deferred pending action on related substituted compliance determinations.[1410] Commenters also stated that any withdrawal or modification of a substituted compliance determination by the Commission should also be subject to a phase-in period.[1411]
- *Availability to major participants.* Two commenters disagreed with the proposal that substituted compliance not be available to major security-based swap participants.[1412] In contrast, one commenter expressed opposition to the possibility of making substituted compliance available to major participants.[1413]
- *Other.* In response to questions posed by the Cross-Border Proposing Release, certain commenters opposed certain potential limitations to the availability of substituted compliance.[1414] One commenter supported a standard timeframe for the review of substituted compliance applications.[1415]

3. Response to Comments and Final Rule

After considering the comments received, the Commission is adopting Rule 3a71–6 to make substituted compliance potentially available in connection with the business conduct requirements being adopted today.[1416] The final rule has been modified from the proposal in a number of ways, including, as discussed below: Consistent with the scope of the current rulemaking, the final rule solely addresses the use of substituted compliance to satisfy those business conduct requirements (rather than addressing the availability of substituted compliance more generally in connection with section 15F requirements other than registration requirements, as proposed);[1417] and the final rule makes substituted compliance potentially available to registered Major SBS Participants (rather than limiting the potential availability of substituted compliance to registered SBS Dealers, as proposed).[1418]

a. Basis for Availability of Substituted Compliance in Connection With Business Conduct Requirements

As discussed elsewhere, the security-based swap market is global, with a prevalence of cross-border transactions within that market.[1419] The cross-border nature of this market poses special regulatory challenges in connection with the rules we are adopting today, in that the Title VII business conduct requirements applicable to SBS Dealers or Major SBS Participants have the potential to lead to requirements that are duplicative of or in conflict with applicable foreign business conduct requirements, even when the two sets of requirements implement similar goals and lead to similar results. Such results have the potential to disrupt existing business relationships and, more generally, to reduce competition and market efficiency.

The Commission accordingly proposed to implement a substituted compliance framework "to address the effect of conflicting or duplicative regulations on competition and market efficiency and to facilitate a well-functioning global security-based swap market." [1420] In the Commission's view, under certain circumstances it may be appropriate to allow for substituted compliance whereby market participants may satisfy certain of the Title VII business conduct requirements by complying with comparable foreign requirements. In this manner, registered entities could comply with a single set of requirements where substituted compliance is deemed appropriate, while remaining subject to robust oversight. Accordingly, substituted compliance may be expected to help achieve the goals of Title VII in a way that promotes market efficiency, enhances competition and facilitates a well-functioning global security-based swap market.

In reaching this conclusion, the Commission notes that one commenter has questioned the Commission's authority to grant substituted compliance and has expressed skepticism regarding the policy basis for

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security-based swap dealers through the cooperative arrangements entered into with the relevant non-U.S. regulator(s).").

[1410] *See, e.g.,* FOA, *supra* note 8 (suggesting that the Commission consider "a phased implementation process" for substituted compliance, whereby the Commission would "consider delaying the effectiveness of the compliance obligations applicable to non-U.S. security-based swap dealers and major security-based swap participants until such time as the SEC has been able to make substituted compliance determinations in respect of those jurisdictions that are most active in the international derivatives markets"; also supporting a "temporary" substituted compliance regime whereby, following submission of a substituted compliance request, "market participants from that jurisdiction would be permitted to continue to comply with home country regulations until such time as the SEC determines that it will not permit substituted compliance in respect of some, or all, of such home country's regulatory requirements"); ABA, *supra* note 8 ("However, we recommend that the Commission further clarify the details of its proposed substituted compliance analysis; for example, by indicating that it will consider deferring the application of relevant entity-level requirements pending final action on a particular request."); SIFMA (August 2013), *supra* note 7 ("[W]e believe that Foreign SBSDs should be provided relief from compliance with Entity-Level Requirements until the Commission has had the opportunity to provide substituted compliance determinations. We believe that this is preferable to requiring Foreign SBSDs to have to build the technological, operational and compliance systems required to comply with U.S. law for a short, interim period. This should be the case so long as that period of time is anticipated to be reasonably brief and the Commission anticipates a possibility that the finalized regulations will be sufficiently comparable.").

[1411] *See* SIFMA (August 2013), *supra* note 7, at A–36–37 ("[M]arket participants are likely to design systems and processes to comply with an approved substituted regulatory regime after the Commission has made such a determination. Withdrawal or modification of such a determination could cause significant operational difficulties for market participants, that may have to realign their internal infrastructure to be in compliance with the Commission's requirements."); FOA, *supra* note 8 ("any decision by the SEC to modify or withdraw a substituted compliance determination should be subject to an appropriate phased timetable to permit market participants sufficient time to adjust their systems and operations to the new compliance obligations").

[1412] *See* SIFMA (August 2013), *supra* note 7, at A–34 ("Without this allowance, MSBSPs subject to comparable regulation in their home jurisdiction would be forced to comply with duplicative or potentially conflicting regulatory regimes."); IIB (August 2013), *supra* note 8, at 22 ("We see no reason why such institutions, if they exceed one of the MSBSP thresholds, should be no less eligible for substituted compliance than a foreign SBSD.").

[1413] *See* Better Markets (August 2013), *supra* note 7, at 29 (supporting proposed approach, citing lack of data and limited information, and adding that the Commission should not consider substituted compliance for major participants "until and unless industry participants provide reliable and comprehensive data proving that it would be otherwise prudent to do so").

[1414] *See, e.g.,* ISDA (August 2013), *supra* note 7, at 7 (opposing potential conditions requiring that U.S. counterparties be qualified institutional buyers or qualified investors, and opposing any use of a threshold requirement that non-U.S. security-based swap dealers predominantly engage in non-U.S. business); ABA, *supra* note 8 (opposing limiting substituted compliance to qualified institutional buyers or qualified investors); *see also* Cross-Border Proposing Release, 78 FR at 31091–92, *supra* note 6 (soliciting comment on those potential limitations to the availability of substituted compliance).

[1415] *See* FOA, *supra* note 8 ("The FOA recognises that the timeline for reviewing a request for substituted compliance and reaching an informed decision will likely vary, for example due to the nature of the regulatory regime in a given jurisdiction or the SEC staff's lack of familiarity with a particular jurisdiction's approach. Nevertheless, the FOA believes that it is essential that there be a standard timeframe for the SEC to reach a substituted compliance determination. Any uncertainty regarding the timeline for compliance with regulatory obligations creates a significant amount of additional complexity for market participants that are already faced with substantial operational and compliance burdens in preparing for the compliance dates of new regulations.").

[1416] The final rule has been renumbered from the proposal.

[1417] *See* Section III.B.3.b, *infra.*

[1418] *See* Section III.B.3.c, *infra.*

[1419] *See* Section VI.B.3, *infra.*

[1420] *See* Cross-Border Proposing Release, 78 FR at 31086, *supra* note 6.

permitting the use of substituted compliance to satisfy Title VII requirements.[1421] In contrast to the suggestion of that comment, however, substituted compliance does not constitute exemptive relief and does not excuse registered SBS Entities from having to comply with the Exchange Act business conduct requirements. Instead, substituted compliance provides an alternative method of satisfying those requirements under Title VII.

Moreover, the same commenter's view that substituted compliance would lead to a lowering of regulatory standards is addressed by the provision that any grant of substituted compliance would be predicated on there being comparable requirements in the foreign jurisdiction. Indeed, in the Commission's view, the potential for substituted compliance will help to promote the effective application of Title VII requirements, by making it less likely that certain market participants that are complying with comparable foreign requirements will determine that they need to choose between modifying their business conduct systems to reflect the requirements of U.S. rules, or else limiting or ceasing their participation in the U.S. market.[1422]

This commenter also expressed the view that any Commission action of this nature at a minimum should be predicated on a finding that there is an actual conflict between Title VII and foreign requirements.[1423] In the Commission's view, however, requiring a showing of actual conflict as a condition to substituted compliance should not be necessary as substituted compliance is intended to promote compliance efficiencies in connection with potentially duplicative requirements (as well as conflicting requirements).[1424]

b. Structure and Scope of the Final Rule

i. In General

As noted, the final rule has been revised from the proposal to reflect that until other Title VII rules are adopted, substituted compliance will be available only with respect to the business conduct rules. The Commission expects to assess the potential availability of substituted compliance in connection with other requirements when the Commission considers final rules to implement those requirements.

To implement this revised approach, paragraph (a)(1) of Rule 3a71–6 as adopted provides that the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under that foreign financial regulatory system by a registered SBS Dealer and/or by a registered Major SBS Participant—each a "security-based swap entity" under the rule—or class thereof, may satisfy the corresponding requirements identified in paragraph (d) of rule 3a71–6 that would otherwise apply.[1425] Paragraph (d), discussed below, is an addition from the proposal that specifies the business conduct requirements that the Commission is adopting.[1426]

Paragraph (a)(2) of the final rule provides that the Commission will not make a substituted compliance determination unless it determines that the foreign requirements applicable to the SBS Entity (or class thereof), or to the activities of such entity (or class thereof), are comparable to the otherwise applicable requirements, after taking into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements (taking into account applicable criteria set forth in paragraph (d)), as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign authority to support its oversight of the SBS Entity (or class thereof) or of the activities of the entity (or class thereof). This provision has been revised from the proposal in part to make the rule more flexible, by permitting substituted compliance to be predicated either on foreign regulation of the entity (or class), or, alternatively, on foreign regulation of the entity's (or class's) activities. In this way, the rule can account for situations in which a foreign regulatory regime does not specifically provide for the registration of a particular category of market participant, but nonetheless effectively regulates the activities of members of that category.[1427]

Paragraph (a)(2) of the rule further provides that the Commission will not make a substituted compliance determination unless the Commission has entered into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.[1428] This provision should help ensure that both regulators will cooperate with each other within the substituted compliance framework, such that both regulators have information that will assist them in fulfilling their respective regulatory mandates. Moreover, the Commission may, on its own initiative, by order, modify or withdraw a substituted compliance determination after appropriate notice and opportunity for comment.[1429]

[1421] *See* notes 1383 and 1384, *supra*.

[1422] The Commission further notes that section 752(a) of the Dodd-Frank Act in part requires that the Commission consult with the foreign regulatory authorities on the establishment of consistent regulatory standards with respect to the regulation of security-based swaps. The use of substituted compliance to help mitigate the impacts of inconsistent and duplicative requirements is consistent with that statutory direction.

[1423] *See* note 1385, *supra*.

[1424] In light of the benefits associated with substituted compliance, the final rule also does not include potential limitations, for which the proposing release solicited comment, that would have conditioned substituted compliance on a non-U.S. entity not transacting with U.S. counterparties that are not qualified institutional buyers or qualified investors, or that would have required that non-U.S. entities receiving substituted compliance predominantly engage in non-U.S. business. *See* note 1414, *supra*.

[1425] *See* Exchange Act Rule 3a71–6(a)(1). The proposed rule would have made substituted compliance potentially available for all of the section 15F dealer requirements other than registration requirements. The structure of the final rule implements a more targeted approach whereby the Commission will assess the availability of substituted compliance when the Commission considers the applicable substantive rules. Consistent with this approach, the final rule does not include proposed paragraph (a)(3), which would have specified that substituted compliance would not be available in connection with the registration requirements of section 15F. *See generally* Registration Adopting Release, 80 FR at 48972–73, *supra* note 989 (determining that substituted compliance would not be available in connection with the registration requirements for security-based swap dealers, and stating that "[p]ermitting a foreign SBS Dealer to satisfy these requirements through compliance with the relevant requirements in its home jurisdiction, even with appropriate notice of such compliance to the Commission, may deprive the Commission of the necessary information, including information resulting from inspection and examination of the books and records of a firm engaged in dealing activity at levels above the *de minimis* threshold.").

Paragraph (a)(1) of the final rule also has been modified from the proposal to remove language limiting substituted compliance to "foreign" entities. Substituted compliance for the business conduct standards at issue here will be available only to foreign security-based swap dealers and foreign major security-based swap participants, and the Commission expects to assess whether substituted compliance should be limited to foreign entities in connection with other section 15F requirements.

[1426] Exchange Act Rule 3a71–6(d).

[1427] In other words, for example, under the final rule the Commission may make substituted compliance available in connection with a foreign regulatory regime that does not make use of a specific registration category for dealers in security-based swaps, but that nonetheless regulates such dealers in a manner that is comparable to the section 15F requirements.

As proposed, paragraph (a)(2) made no mention of particular criteria associated with a substituted compliance determination. Paragraph (a)(2) of the final rule, however, specifies that in considering the scope and objectives of the relevant foreign requirements, the Commission intends to consider applicable criteria that are set forth in new paragraph (d). *See* Section III.B.3.e, *infra*.

[1428] *See* Exchange Act Rule 3a71–6(a)(2)(ii). Paragraph (a)(2)'s reference to supervisory and enforcement cooperation and other matters further has been revised from the proposal, which addressed the "oversight and supervision" of applicable security-based swap dealers. This change is to help ensure that enforcement cooperation is encompassed within those arrangements, given the importance of enforcement in promoting

Paragraph (b) of the final rule specifies that a registered SBS Entity may satisfy the Exchange Act requirements identified in paragraph (d) of the rule by complying with corresponding law, rules and regulations under a foreign financial regulatory system, provided that: (1) The Commission has made a determination providing that compliance with specified requirements under the foreign financial regulatory system by such registered security-based swap entity (or a class thereof) may satisfy the corresponding requirements, and (2) such entity satisfies any conditions set forth in the Commission's determination.[1430]

Paragraph (c) of the final rule addresses requests for substituted compliance determinations. As discussed below, those application provisions have been revised from the proposal in certain respects.[1431]

To implement the final rule's targeted approach toward substituted compliance, paragraph (d) of rule 3a71–6 states that substituted compliance will be available in connection with the business conduct and supervision requirements of sections 15F(h) and 15F(j) and rules 15Fh–3 through 15Fh–6, and the CCO requirements of section 15F(k) and rule 15Fk–1, subject to exceptions discussed below.[1432]

As discussed below, moreover, paragraph (d) specifies that prior to making these substituted compliance determinations, the Commission intends to consider whether the information required to be provided to counterparties pursuant to the requirements of the foreign jurisdiction, the counterparty protections of the foreign jurisdiction, the mandates for supervisory systems under the requirements of the foreign jurisdiction, the duties imposed by the foreign jurisdiction, and the CCO requirements of the foreign jurisdiction, are comparable to the Exchange Act requirements.[1433] Those factors are relevant to the comparability analysis, and their inclusion in the final rule also responds to commenters that expressed the view that the rules should provide more guidance regarding comparability criteria.[1434] At the same time, as discussed below, substituted compliance does not require that there be requirement-by-requirement comparability between Exchange Act requirements and foreign requirements, as the operative question is whether there is the comparability of the associated regulatory outcomes.[1435]

Finally, the Commission is not persuaded by commenter requests that we provide phase-in periods or other means to link the timing of the substantive requirements under the Exchange Act with the availability of substituted compliance.[1436] The effective dates and compliance dates for these business conduct requirements reflect the need to implement those requirements in a timely manner, regardless of whether the alternative route provided by substituted compliance is available.[1437]

ii. Unavailability in Connection With Antifraud Prohibitions and Certain Other Requirements

Paragraph (d)(1) of the final rule provides that substituted compliance is not available in connection with Exchange Act section 15F(h)(4)(A), which in relevant part prohibits SBS Dealers from engaging in fraudulent activities in connection with special entities and more generally. The rule also provides that substituted compliance is not available in connection with Exchange Act rule 15Fh–4(a), which implements that statutory antifraud provision.

In the Commission's view, substituted compliance is not appropriate in connection with those explicit statutory prohibitions of fraudulent conduct, given the central role of the antifraud provisions of the securities laws in protecting the integrity and reputation of U.S. financial markets. The Commission also notes that concerns regarding regulatory duplication do not arise in the context of such antifraud prohibitions in the same way they may arise with respect to other provisions.

Paragraph (d)(1) further provides that substituted compliance is not available in connection with Exchange Act sections 15F(j)(3) and (j)(4)(B). Section 15F(j)(3) requires that SBS Entities disclose, to the Commission and the applicable prudential regulators, information concerning: The terms and conditions of the entity's security-based swaps; security-based swap trading operations, mechanisms and practices; financial integrity protections relating to security-based swaps; and other information relevant to the entity's trading in security-based swaps. Section 15F(j)(4)(B) provides that the SBS Entity upon request shall provide the Commission and any applicable prudential regulator with information necessary to perform statutory functions under Section 15F. In our view, the Commission's oversight of SBS Entities requires that the Commission be able to directly access relevant information from those entities. Accordingly, the Commission does not believe that those requirements that SBS Entities provide information to the Commission are reasonably amenable to being satisfied

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compliance with applicable requirements. The change parallels comparable language in the substituted compliance rules applicable to Regulation SBSR. *See* Regulation SBSR 908(c)(2)(iv).

[1429] *See* Exchange Act Rule 3a71–6(a)(3).

Commenters stated that any withdrawal or modification of a substituted compliance determination by the Commission should also be subject to a phase-in period. *See* note 1411, *supra.* The final rule does not contain any such provision for a phase-in period, however, given that substituted compliance is predicated on the relevant foreign requirements being comparable to the Title VII requirements, and on the adequacy of the relevant foreign authority's supervision and enforcement in connection with those foreign requirements. Subject to that principle, the Commission in practice would expect to consider such timing and operational issues in the event that it were to reconsider a previous grant of substituted compliance. The particular facts and circumstances surrounding such a reconsideration would be relevant to how long substituted compliance would remain available after Commission action.

[1430] *See* Exchange Act Rule 3a71–6(b). This paragraph has been changed from the proposal in certain ways consistent with the changed scope of the rule (*i.e.,* deleting the word "foreign" and replacing "dealer" with "entity") or for clarifying purposes. This paragraph also has been changed from the proposal, which referred to "legislative requirements, rules and regulations," to more flexibly account for the variety of potential sources of applicable requirements.

[1431] *See* Section III.B.3.h, *infra.*

[1432] The business conduct requirements that are the subject of this rulemaking in large part are derived from Exchange Act section 15F(h). As discussed above, however, Exchange Act section 15F(j) imposes on SBS Entities a series of self-executing duties with regard to trade monitoring, risk management systems, regulatory disclosures, information access systems and procedures, conflict-of-interest systems and procedures, and antitrust considerations. Rule 15h–3(h)(2)(iii)(I) requires SBS Entities to adopt written policies and procedures reasonably designed to comply with those duties. *See* note 605, *supra,* and accompanying text.

[1433] *See* note 1458, *infra,* and accompanying text.

[1434] *See* notes 1393 and 1394, *supra.*

[1435] *See* Section III.B.3.e, *infra.*

[1436] *See* note 1410, *supra.*

[1437] Given the facts and circumstances nature of the substituted compliance assessment, the Commission also does not believe that it would be practicable to provide a standard timeframe for reaching substituted compliance determinations. *See* note 1415, *supra.*

via compliance with the requirements of a foreign jurisdiction.[1438]

iii. Application to Particular Requirements

It is possible that substituted compliance may be granted with regard to some of these requirements but not others. As discussed below, the Commission intends to assess the comparability of foreign requirements using a holistic approach that focuses on regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.[1439] At the same time, however, the business conduct requirements being adopted today encompass a range of distinct categories (*e.g.*, supervision, counterparty protection, special entity protection) such that those individual categories may be subject to differing conclusions regarding the comparability of regulatory outcomes and/or the associated foreign enforcement and supervisory practices. Thus, for example, it may be possible that the Commission would make substituted compliance available with regard to a particular foreign regulatory regime in connection with certain counterparty protections required by these rules but not the supervision requirements, or vice versa. Ultimately, this would depend on the relevant facts and circumstances, and their impact upon specific assessments of comparability,[1440] and of supervision and enforcement.

The Commission further anticipates that certain categories of the requirements we are adopting today—related to ECP verification, special entities and political contributions—will raise special issues with regard to comparability, and with regard to whether adequate supervision and enforcement is available under the foreign regulatory regime. Such issues are likely to arise with regard to those particular requirements because each of those requirements address protections that may have no foreign law analogues, as those requirements reflect heightened concerns under U.S. law regarding potential abuses involving particular categories of persons. Indeed, those categories and the protections afforded to them under U.S. law may not correspond with any specified categories of persons or protections under relevant foreign law. As a result, substituted compliance assessments in connection with those categories will require inquiry regarding whether foreign regulatory requirements adequately reflect the same particular interests and protections.

c. Availability to Major SBS Participants

Under the proposed rule, substituted compliance would have been available only to registered SBS Dealers, and would not have been available to registered Major SBS Participants. In taking that proposed position, the Commission noted a lack of information regarding the types of entities that may become Major SBS Participants, and the foreign regulation of those entities.[1441]

Two commenters disagreed with that aspect of the proposal, with one commenter expressing concern regarding major participants being forced to comply with duplicative or potentially conflicting regulatory regimes, and the other commenter suggesting there would be no reason to distinguish between SBS Dealers and Major SBS Participants in this regard.[1442] One commenter, in contrast, opposed the possibility of substituted compliance for Major SBS Participants by citing the lack of relevant information, and stated that the Commission should not consider substituted compliance for Major SBS Participants unless the industry provided data proving that this step would be prudent.[1443]

After further consideration of the issues, the final rule provides that substituted compliance is potentially available in connection with these business conduct requirements for registered Major SBS Participants as well as for registered SBS Dealers. This decision reflects the fact that the business conduct standards apply to registered Major SBS Participants as well as to registered SBS Dealers, and recognizes that the market efficiency goals that underpin substituted compliance also can apply when substituted compliance is granted to registered Major SBS Participants.

To implement this approach, the final rule has been revised from the proposal to specify that the Commission may determine that compliance by a registered SBS Dealer and/or by a registered Major SBS Participants—each a "security-based swap entity" under the rule—may satisfy the business conduct requirements through substituted compliance.[1444] The remainder of the final rule refers to a security-based swap "entity" rather than a security-based swap "dealer."

One commenter had expressed the view that more information is needed before substituted compliance is made available to Major SBS Participants.[1445] In the Commission's view, however, those concerns are adequately addressed by the fact that any grant of substituted compliance in connection with the business conduct requirements applicable to Major SBS Participants would be predicated on a determination that the Major SBS Participants is subject to comparable regulation in a foreign jurisdiction. Absent such a determination—and consistent with the Commission's previously noted concerns regarding the need for information regarding the types of entities that may become Major SBS Participants, and the foreign regulation of those entities—the Commission would not grant substituted compliance in connection with registered Major SBS Participants, even if the Commission were to grant substituted compliance in connection with registered SBS Dealers in the same jurisdiction.

d. Availability of Substituted Compliance With Regard to U.S. and Foreign Entities, Counterparties and Activity

Under the final rule, substituted compliance in connection with the business conduct requirements is not available to entities that are U.S. persons.[1446] On the other hand, entities that are not U.S. persons may rely on substituted compliance to satisfy the business conduct requirements with regard to the entirety of their security-based swap business, regardless of whether their counterparty for a particular transaction is a U.S. person, or whether any of the associated activity occurs in the U.S.

i. No Availability to U.S. Security-Based Swap Dealers or U.S. Major Security-Based Swap Participants

Consistent with the proposal, the final rule does not make substituted compliance available to U.S. security-based swap dealers or U.S. major security-based swap participants in connection with these business conduct requirements.

[1438] In addition, Exchange Act Section 15F(j)(7) authorizes the Commission to prescribe rules governing the duties of SBS Entities. While the Commission is not excluding that provision from the potential availability of substituted compliance, the Commission expects to separately consider whether substituted compliance may be available in connection with any future rules promulgated pursuant to that provision.

[1439] *See* Section III.B.3.e, *infra*.

[1440] As discussed below, substituted compliance is predicated on the comparability of regulatory outcomes, and does not mandate rule-by-rule equivalence between specific requirements under Title VII and analogous foreign requirements.

[1441] *See* note 1382, *supra*.

[1442] *See* note 1412, *supra*.

[1443] *See* note 1413, *supra*.

[1444] *See* Exchange Act rule 3a71–6(a)(1).

[1445] *See* note 1413, *supra*, and accompanying text.

[1446] *See* Exchange Act rule 3a71–6(d). For these purposes, the term "U.S. person" has the meaning set forth in Exchange Act rule 3a71–3(a)(4).

Certain commenters had suggested that substituted compliance for these dealer requirements should be available to foreign branches of U.S. persons,[1447] or to U.S. persons in certain circumstances in connection with transaction-level requirements.[1448] One commenter further expressed the view that foreign branches of U.S. banks may be subject to extensive host country supervision, and that concerns regarding duplicative or inconsistent regulation may arise in connection with the security-based swap activities of U.S. entities. Conversely, one commenter argued that such an extension of the proposed scope of substituted compliance would be inconsistent with the application of U.S. law.[1449]

The Commission concludes on balance that it is appropriate to limit the availability of substituted compliance such that only entities that are not U.S. persons may take advantage of that alternative route for satisfying the Title VII business conduct requirements. In part, this conclusion accounts for the fact that concerns regarding duplication and inconsistency in connection with transaction-level business conduct requirements should be mitigated by the amendment we are adopting to Exchange Act rule 3a71–3, to provide an exception from the business conduct requirements under Exchange Act section 15F(h)—other than supervision requirements pursuant to Exchange Act section 15F(h)(1)(B)—for registered U.S. SBS Dealers in connection with foreign business conducted through their foreign branches.[1450]

The Commission recognizes that the above exception would not mitigate the possibility that U.S. entities may face duplication or inconsistency in certain circumstances. For example, for non-U.S. business that U.S. SBS Dealers and U.S. Major SBS Participants conduct through their foreign branches, such duplication or inconsistency may still arise in connection with the entity-level supervision and CCO regulations being adopted today. For the other security-based swap business of those U.S. SBS Entities, such duplication or inconsistency potentially may arise in connection with any of the business conduct requirements being adopted today.

The Commission nonetheless believes that substituted compliance should not be available to registered entities that are U.S. persons. This conclusion reflects a number of policy considerations. Fundamentally, this approach acknowledges that dealers and major participants that fall within the "U.S. person" definition have a heightened connection to the U.S. market.[1451] As a result of that heightened connection, it is the Commission's judgment that a U.S. SBS Entity's compliance with the business conduct requirements of Title VII, and the Commission's associated oversight of that entity's security-based swap business, should occur without the potential availability of substituted compliance. Although substituted compliance is predicated on there being comparability with Title VII requirements, and does not exempt or otherwise excuse compliance with Title VII, in the Commission's view direct compliance with the Title VII business conduct requirements by U.S. SBS Entities will efficiently facilitate the Commission's regulatory oversight of entities that have a heightened connection to the U.S. market. That warrants such limits to substituted compliance in our view, notwithstanding the general considerations that support the availability of substituted compliance in connection with the business conduct requirements.

This conclusion also reflects our view that U.S. market participants generally would have a reasonable expectation that the business conduct requirements of Title VII would apply directly, and that the activities of such U.S. persons would be subject to Commission oversight with a degree of directness that may not be present in connection with substituted compliance.

ii. Availability in Connection With U.S. Counterparties and U.S. Activity

Consistent with the proposal, the final rule does not contain any provisions that would limit the ability of foreign registered entities to use substituted compliance to satisfy the business conduct requirements in connection with transactions involving U.S. counterparties or U.S. activity.

One commenter had expressed the view that substituted compliance should not be available in connection with activities involving U.S. persons or U.S. activity, arguing that the security-based swap activity of U.S. persons directly and immediately impacts the U.S., and would endanger U.S. taxpayers if improperly regulated.[1452] We concur with that commenter regarding the need for proper regulation of SBS Entities in connection with their security-based swap business involving U.S. counterparties and activity (as well as more generally). At the same time, however, we note that substituted compliance is not an alternative to rigorous regulation, but instead is predicated on there being business conduct regulation comparable with the rules we are adopting today. So long as the Commission determines that corresponding foreign requirements are comparable with those Title VII business conduct requirements, the use of substituted compliance accordingly would uphold the interests associated with those Title VII requirements.

Also, following alternative approaches—such as an approach whereby substituted compliance would not be available to a foreign SBS Entity in connection with transactions involving U.S. counterparties or U.S.

[1447] *See* note 1386, *supra*.

[1448] *See* notes 1388 and 1389, *supra*.

[1449] *See* note 1387, *supra*.

[1450] *See* Exchange Act rule 3a71–3(c); *see also* Section III.A.3.b, *supra*. There is a similar exception from the section 15F(h) business conduct requirements (other than supervision) for registered U.S. Major SBS Participants with respect to security-based swap transactions that constitute transactions through a foreign branch of the registered U.S. Major SBS Participant, that are either with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of that counterparty. *See* Exchange Act rule 3a67–10(d)(2). These exceptions are not available in connection with the CCO requirements, which are promulgated pursuant to Exchange Act section 15F(k).

[1451] The definition of "U.S. person" is designed to encompass persons that have a significant portion of their financial and legal relationships within the U.S. "[T]he definition of 'U.S. person' in [17 CFR 240.3a71–3] is intended, in part, to identify those persons for whom it is reasonable to infer that a significant portion of their financial and legal relationships are likely to exist within the United States and that it is therefore reasonable to conclude that risk arising from their security-based swap activities could manifest itself within the United States, regardless of the location of their counterparties, given the ongoing nature of the obligations that result from security-based swap transactions." "Application of 'Security-Based Swap Dealer' and 'Major Security-Based Swap Participant' Definitions to Cross-Border Security-Based Swap Activities," Exchange Act Release No. 72472 (Jun. 25, 2014), 79 FR 47278, 47289 (Aug. 12, 2014) ("SBS Entity Definitions Adopting Release").

Moreover, the definition of "U.S. person" does not carve out the foreign branches of U.S. persons. In part this reflects the fact that "a person does not hold itself out as a security-based swap dealer as anything other than a single person even when it enters into transactions through its foreign branch or office." *See id.*

Based on the direct nature of this link between the U.S. market and those persons that fall within the "U.S. person" definition, Title VII applies to the security-based swap activities of U.S. persons in a manner that is more comprehensive than its application to the activities of other persons. *See generally id.* at 47288–91 (addressing how dealer and major participant definitions account for all security-based swap activity of U.S. persons because all such activity occurs in the U.S., but account for a more limited subset of the activity of foreign entities).

[1452] *See* note 1390, *supra*.

activity, but would be available in connection with other transactions—in practice may have the effect of forcing the foreign SBS Entity to choose between modifying its business conduct systems, including its supervisory and CCO arrangements to reflect the requirements of U.S. rules, or else exiting the U.S. market and thereby generally reducing competition and market efficiency.[1453]

e. Comparability Criteria

As discussed in the Cross-Border Proposing Release, the Commission will endeavor to take a holistic approach in considering whether regulatory requirements are comparable for purposes of substituted compliance, and will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity. The Commission also continues to recognize that foreign regulatory systems differ in their approaches to achieving particular regulatory outcomes, and that foreign requirements that differ from those adopted by the Commission nonetheless may achieve regulatory outcomes comparable with those of Title VII. The Commission further continues to recognize that different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more or fewer specific requirements than the Commission, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions.[1454]

Accordingly, in considering whether the requirements of a foreign regulatory regime are comparable with the various categories of requirements being adopted today (such as the supervision and counterparty protection requirements we are adopting) the Commission will evaluate whether the foreign requirements provide for regulatory outcomes that are consistent with the regulatory outcomes of the applicable category of requirements. Moreover, as noted above, in application the Commission may determine that for a particular jurisdiction, the prerequisites for substituted compliance have been met in connection with certain categories of requirements but not others.

In reaching this conclusion, the Commission notes that certain commenters opposed the proposed holistic approach toward assessing comparability based on regulatory outcomes, and that instead expressed the views that any assessments should be done on a requirement-by-requirement basis. Those views at least in part reflected the reasoning that an outcomes-based approach would be subjective and would lead to a "hypothesized similarity in outcomes for sets of rules that are quite different in substance." [1455] In this regard, the Commission recognizes that a requirement-by-requirement approach would be easier to implement and simpler to translate into objective criteria than an alternative approach that focuses on regulatory outcomes. Such a requirement-by-requirement approach, however, could foreclose any grants of substituted compliance, because even highly similar regulatory regimes are likely to have technical differences in the implementing rules. More generally, the Commission believes that the proper focus for analyzing substituted compliance should address regulatory outcomes, because a standard that turns upon the comparability of regulatory outcomes can promote regulatory efficiency in a way that preserves the key protections associated with the business conduct rules, and in a manner that reflects the cross-border nature of the market and helps to curb fragmentation, while facilitating the ability of U.S. persons to participate in the global security-based swap market.[1456]

As noted above, the Commission foresees that there will be difficult questions connected with comparability assessments for Dodd-Frank requirements related to ECP verification, special entities and political contributions, given that those particular requirements all address activities involving certain classes of U.S. persons, and reflect heightened concerns regarding potential abuses involving such persons.[1457] Recognizing that the comparability assessments will focus on regulatory outcomes rather than rule-by-rule comparisons, the assessments will require inquiry regarding whether foreign regulatory requirements adequately reflect those particular interests and protections.

Moreover, paragraph (d) of the final rule (which as discussed above has been added to the rule to specify the requirements for which substituted compliance potentially is available), provides that prior to making these substituted compliance determinations, the Commission intends to consider whether the information required to be provided to counterparties pursuant to the requirements of the foreign jurisdiction, the counterparty protections of the foreign jurisdiction, the mandates for supervisory systems under the requirements of the foreign jurisdiction, the duties imposed by the foreign jurisdiction, and the CCO requirements of the foreign jurisdiction, are comparable to the Exchange Act requirements.[1458] Those provisions have been included as part of new paragraph (d) in response to commenters to the Cross-Border Proposing Release that requested specific guidance regarding the criteria the Commission will consider in making comparability assessments,[1459] or that challenged the rule's lack of particularized elements for assessing comparability.[1460] While recognizing those commenters' wish for additional guidance to assist in making applications for substituted compliance, and for assessment criteria that are as specific and objective as possible, in this circumstance the Commission believes that the comparability assessments will turn upon relevant facts and circumstances in a manner such that it would not be practicable to include more specific criteria in the rule.

One commenter questioned how the Commission would be notified of material changes to foreign law that underpins a substituted compliance determination.[1461] The Commission expects to address those issues in connection with considering specific applications for substituted compliance, and notes that, potentially, the requirement that the Commission be notified of material changes in foreign law could be incorporated as conditions to substituted compliance orders, or as part of memoranda of understanding or other arrangements between the Commission and the relevant foreign financial regulators.[1462]

[1453] Other alternative approaches for addressing the application of substituted compliance could be, for example, to permit substituted compliance in connection with U.S. activity that does not involve U.S. counterparties, or allowing substituted compliance for transaction with U.S. counterparties only so long as no U.S. activity is involved. Reducing the availability of substituted compliance in such a manner, however, would be expected to be accompanied by a corresponding reduction to the competition and market efficiency benefits associated with substituted compliance.

[1454] *See* Cross-Border Proposing Release, 78 FR at 31085–86, *supra* note 6.

[1455] *See* note 1391, *supra*.

[1456] A requirement-by-requirement standard, in contrast, similarly would promote key protections, but would not adequately address the cross-border nature of the market and the ability of U.S. persons to participate in the global market.

[1457] *See* Section III.B.3.b.iii, *supra*.

[1458] *See* Exchange Act rule 3a71–6(d)(1). The rule further provides that prior to making a substituted compliance determination in connection with the CCO requirements of section 15F(k), the Commission intends to consider whether the requirements of the foreign jurisdiction regarding CCO requirements are comparable to those required pursuant to the applicable Exchange Act requirements. *See* Exchange Act rule 3a71–6(d)(2).

[1459] *See* note 1393, *supra*.

[1460] *See* note 1394, *supra*.

[1461] *See* note 1395, *supra*.

Commenters also expressed the views that regulatory comparisons should focus on common principles associated with shared G–20 Leaders goals,[1463] urged the need for consistency and coordination with the work of other regulators and IOSCO,[1464] and with the CFTC,[1465] and also supported building on existing cooperative initiatives,[1466] and supported deference to non-U.S. oversight when possible.[1467] While the Commission intends to be mindful of those various goals and principles as part of its comparability analyses, the decision whether to grant substituted compliance ultimately must focus on whether a foreign regime produces regulatory outcomes consistent with the applicable provisions of the Exchange Act. That type of assessment necessarily must focus on Exchange Act requirements.

Finally, one commenter argued that to help manage operational complexities, the entirety of a regulatory regime should be deemed comparable with the Exchange Act requirements if a significant portion of that regime is found to be comparable.[1468] In the Commission's view, however, such an approach would be inconsistent with the predicate for substituted compliance that there be the comparability of regulatory outcomes. If a foreign regulatory regime does not achieve a regulatory outcome that is comparable to the regulatory outcome associated with particular Exchange Act requirements, then the basis for substituted compliance will not have been satisfied. In that case, substituted compliance would not be appropriate with regard to such requirements, notwithstanding its potential availability in connection with other requirements.

f. Consideration of Supervision and Enforcement Practices

Assessment of a foreign regulatory regime's supervisory and enforcement practices is expected to be a critical component of any Commission decision to permit substituted compliance. As discussed in the Cross-Border Proposing Release, when the Commission assesses a foreign regulatory regime's oversight for purposes of making a substituted compliance determination, the Commission expects to consider not only overall oversight activities, but also oversight specifically directed at conduct and activity that would be relevant to the substituted compliance determination.[1469] For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.

In making this consideration a prerequisite for substituted compliance, the Commission in no way should be interpreted as minimizing the significance of the Commission's own independent obligation to supervise the compliance of registered entities with Title VII requirements, even when requirements may be satisfied via substituted compliance. Registered entities are subject to the requirements of Title VII, and the Commission retains its full authority to inspect, examine and supervise those entities' compliance with Title VII, and take enforcement action as appropriate, regardless of the availability of substituted compliance.

One comment emphasized that the assessment must address a foreign regulatory regime's supervisory and enforcement capabilities in practice, not merely on paper.[1470] Another comment stated that differences among the supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.[1471] The Commission expects that its consideration of the effectiveness of a foreign regulatory regime's practices will account for those factors in conjunction with other relevant factors.[1472]

Applying those principles here, the Commission notes that the difficult questions noted above with respect to requirements regarding ECP verification, special entities and political contributions also can be expected to manifest themselves in connection with our consideration of a foreign regulatory regime's supervisory and enforcement practices. That is, as the Commission evaluates the foreign regulatory regime's supervisory and enforcement practices in connection with substituted compliance, the Commission necessarily will seek to evaluate whether those supervisory and enforcement practices will adequately support regulatory outcomes consistent with those particular requirements (as well as the other business conduct requirements).

More generally, the scope of any grant of substituted compliance may be linked to the scope of foreign regulatory regime's supervision and enforcement practices. For example, if a foreign regulatory regime closely oversees the security-based swap business that an SBS Entity conducts through an office located in that non-U.S. jurisdiction, but does not exercise the same degree of regulatory oversight over a branch of that entity that is located in the U.S., it is possible that any grant of substituted compliance would not extend to activities conducted through the entity's U.S. branch.

g. Multi-Jurisdictional Issues

Commenters further have raised certain issues—that were not addressed in the Cross-Border Proposing Release—regarding how the substituted compliance rule would apply to certain special circumstances involving multi-jurisdictional activities of foreign security-based swap dealers. While recognizing the facts-and-circumstances nature of the application of substituted compliance under the final rule, the Commission anticipates that the final rule would apply generally to such circumstances in the following manner:

i. Third-Country Branches

One commenter particularly raised questions regarding the application of substituted compliance in connection with third-country branches of foreign security-based swap dealers, and requested further guidance regarding how substituted compliance would apply to circumstances where an entity located in one country has a branch located in another country that engages in dealing activity.[1473] The potential availability of substituted compliance under the final rule will reflect the scope of any relevant substituted compliance order, including, for instance, whether an order for a particular jurisdiction extends to third-country branches of entities domiciled within that jurisdiction. The scope of any such order—and hence the potential availability of substituted compliance for a third-country branch—necessarily will turn upon the applicable facts and circumstances.

[1462] Substituted compliance orders further may be conditioned on security-based swap dealers and major security-based swap participants that rely on substituted compliance notifying the Commission of that reliance. In that respect, the forms that the Commission has adopted for use by applicants for registration as security-based swap dealers or major security-based swap participants provides for applicants to notify the Commission regarding intended reliance on substituted compliance. *See* Registration Adopting Release, 80 FR at 49049, *supra* note 989 (questions 3A, B and C of Form SBSE–A, addressing potential reliance on substituted compliance determinations).

[1463] *See* note 1396, *supra*.

[1464] *See* note 1397, *supra*.

[1465] *See* note 1399, *supra*.

[1466] *See* note 1398, *supra*.

[1467] *See* note 1407, *supra*.

[1468] *See* note 1400, *supra*.

[1469] *See* Cross-Border Proposing Release, 78 FR at 31088 n.1117, *supra* note 6.

[1470] *See* note 1401, *supra*.

[1471] *See* note 1402, *supra*.

[1472] In this regard, the Commission notes that one commenter requested further guidance regarding the Commission's consideration of the effectiveness of foreign supervision and enforcement. *See* note 1403, *supra*. In the Commission's view, however, consideration of foreign supervisory and enforcement effectiveness will turn upon relevant facts and circumstances in a manner such that it would not be practicable to provide more specific guidance regarding specific factors that may be included within that analysis.

ii. Substituted Compliance and the European Union

Commenters also raised issues regarding the assessment of substituted compliance in the context of the European Union, stating that certain rules are adopted at a European level and are applied directly by individual member states.[1474] In the Commission's view, such issues may be expected to affect analyses of substantive comparability in a manner that differs from the way they may apply to consideration of the adequacy of a foreign regulatory regime's enforcement and supervisory system. In particular, to the extent that substantive requirements are promulgated at a multi-state level, the Commission's analysis may consider whether those multi-state requirements are comparable to the corresponding Exchange Act requirements. In contrast, to the extent that the enforcement and supervision of those requirements is conducted at the member state level, then the Commission necessarily would assess the adequacy of a foreign regulatory regime's enforcement and supervisory system at the member state level. Any grant of substituted compliance necessarily would take into account both the substantive requirements and the adequacy of the relevant enforcement and supervisory system.

iii. Additional Cross-Jurisdictional Issues

Another commenter raised issues regarding which sets of requirements would apply to transactions between parties in different markets, and whether the parties to cross-jurisdiction transactions may choose which rules apply.[1475] As discussed above, substituted compliance is intended to help promote efficiency, enhance competition and facilitate a well-functioning market by helping SBS Entities avoid regulatory conflicts or duplication. Substituted compliance is not mandatory, moreover, so when it is available a non-U.S. SBS Entity may elect whether to rely on comparable foreign requirements with regard to its security-based swap business or some discrete portion of that business. However, the policies and procedures of non-U.S. SBS Entities generally should address with particularity when the entity will rely on substituted compliance with regard to particular requirements (*e.g.*, with regard to particular portions of their security-based swap business and/or particular counterparties).

h. Applications for Substituted Compliance and Related Prerequisites

Paragraph (c)(1) of the final rule provides that a party or group of parties that potentially would rely on substituted compliance, or any foreign financial regulatory authority or authorities supervising such a party or its security-based swap activities, may file an application, pursuant to the procedures set forth in Exchange Act Rule 0–13 requesting that the Commission make a substituted compliance determination.[1476] Exchange Act Rule 0–13 is a procedural rule that the Commission has adopted regarding the submission of substituted compliance applications, and provides for the opportunity for public comment on completed applications.[1477] Paragraph (c)(1) has been revised from the proposal (which only referred to applications by security-based swap dealers) to reflect the fact that Rule 0–13 provides for applications by foreign financial authorities.[1478] Also, to avoid duplicating the requirements of Rule 0–13, paragraph (c)(1) also has been revised from the proposal by removing references to the need for the applicant to provide the reasons for the request and provide supporting documentation as the Commission may request.

In addition, paragraph (c)(1) has been revised from the proposal to provide that applications may be made by parties or groups of parties that potentially would rely on substituted compliance, in lieu of the proposed reference to applications by foreign security-based swap dealers or groups of dealers "of the same class." This change in part accommodates the possibility that market participants may seek approval to rely on substituted compliance prior to their being deemed to be "security-based swap dealers" or "major security-based swap participants" under the applicable definitions. The final rule also does not limit joint applications to those that come from persons "of the same class," to facilitate the Commission's ability to consider applications jointly submitted by multiple entities notwithstanding differences in their businesses.[1479]

In connection with applications submitted by such parties, Rule 3a71–6(c)(2)(i) states that such a party (or group of parties) may make a substituted compliance request only if the party or the party's activities are "directly supervised by the foreign financial regulatory authority or authorities with respect to the foreign regulatory requirements relating to the applicable requirements."[1480] This condition should help promote the principles that condition substituted compliance on the effectiveness of the supervision and enforcement exercised by the foreign authority, by reflecting the fact that substituted compliance will not be allowed for entities that are not subject to foreign oversight in connection with their security-based swap business.

The final rule further provides that to make a request for substituted compliance, each such party must provide the certification and opinion of counsel that is described in Exchange Act rule 15Fb2–4(c), as if the party were subject to that requirement at the time of the request.[1481] Rule 15Fb2–4(c) requires that nonresident security-based swap dealers and major security-based swap participants must certify, and provide an associated opinion of counsel, that the entity can as a matter of law, and will, provide the Commission with prompt access to the entity's books and records and submit to onsite inspection and examination by the Commission.[1482] This part of the final rule is generally consistent with the proposal, with one change to permit an entity to apply for substituted compliance before the entity registers with the Commission.[1483]

[1473] *See* note 1404, *supra.*

[1474] *See* note 1406, *supra.*

[1475] *See* note 1405, *supra.*

[1476] *See* Exchange Act rule 3a71–6(c)(1). The final rule accordingly provides that a foreign financial regulatory authority may submit a substituted compliance application if that authority supervises a party that would rely on substituted compliance, or supervises that party's activities. A regulatory authority that does not possess such supervisory responsibilities would not be eligible to submit a substituted compliance application, even if that authority promulgates rules or other requirements applicable to such parties' security-based swap activities.

[1477] Among other respects, Rule 0–13 provides that applications must include any supporting documents necessary to make the application complete, "including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor and enforce compliance with such rules." Rule 0–13 further provides that Commission staff will review the application after the filing is complete, and that completed applications will be published for public comment.

[1478] *See* Cross-Border Adopting Release, 79 FR at 47358, *supra* note 193 (concluding, in adopting Rule 0–13, that "allowing foreign regulators to submit such requests would promote the completeness of requests and promote efficiency in the process for considering such requests").

[1479] Paragraphs (c)(1) and (c)(2) also have been changed to reflect the possibility that the foreign regulators may supervise the party, or the party's activities.

[1480] *See* Exchange Act rule 3a71–6(c)(2)(i). This provision has been changed from the proposal to reflect the fact that potential applicants will not be limited to security-based swap dealers. This provision also has been changed from the proposal by removing a redundant reference to the foreign authorities being "under the system." In addition, the introductory part of paragraph (c)(2) has been modified from the proposal to refer to requests made "pursuant to paragraph (c)(1)" (rather than "pursuant to paragraph (a)(1)" as set forth in the proposal), consistent with the revised structure of the rule.

The final rule also has been revised from the proposal to implement an analogous requirement in connection with substituted compliance applications by foreign financial regulatory authorities.[1484] In particular, the final rule provides that foreign financial regulatory authorities may make substituted compliance requests only if each such authority provides adequate assurances that no law or policy of any relevant foreign jurisdiction would impede the ability of any entity that is directly supervised by the foreign financial regulatory authority, and that may register with the Commission as a security-based swap dealer or major security-based swap participant, to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.[1485]

In general, those prerequisites to the submission of substituted compliance applications by entities or by foreign financial authorities should promote efficiency in the substituted compliance assessment process. The prerequisites particularly will help focus such assessments upon those jurisdictions that would not effectively prohibit entities from registering as dealers or major participants as a result of blocking statutes or other laws or policies that otherwise would impede the Commission's ability to exercise its supervisory authority and responsibilities over registered entities. In other words, if a jurisdiction has blocking statutes or other laws or policies that would preclude the registration of such dealers and major participants with the Commission, there would be no purpose to the Commission considering a substituted compliance application in connection with that jurisdiction.

Exchange Act rule 0–13, which addresses the submission of substituted compliance applications, states that the Commission will not consider hypothetical requests for substituted compliance orders.[1486] Consistent with that limitation, when the Commission reviews substituted compliance applications, it would take into account whether particular jurisdictions contain entities that reasonably may be expected to register with the Commission as security-based swap dealers or major security-based swap participants based on their level of security-based swap activity connected with U.S. persons or the U.S. market.

IV. Explanation of Dates

A. Effective Date

These final rules will be effective 60 days following publication in the **Federal Register**.

B. Compliance Date

The Commission believes it appropriate not to apply these rules until entities are required to register as SBS Dealers or Major SBS Participants. Therefore, with the exception of the application of customer protection requirements described in final Rule 3a71–3(c) to transactions described under final Rule 3a71–3(a)(8)(i)(B), the Commission is adopting a compliance date for final Rules 15Fh–1 through 15Fh–6[1487] and Rule 15Fk–1 that is the same as the compliance date of the SBS Entity registration rules ("Registration Compliance Date").[1488]

In the Registration Adopting Release, the Commission provided that the Registration Compliance Date will be the later of: Six months after the date of publication in the **Federal Register** of final rules establishing capital, margin and segregation requirements for SBS Entities;[1489] the compliance date of final rules establishing recordkeeping and reporting requirements for SBS Entities;[1490] the compliance date of final rules establishing business conduct requirements under Sections 15F(h) and 15F(k) of the Exchange Act; or the compliance date for final rules establishing a process for a registered SBS Entity to make an application to the Commission to allow an associated person who is subject to a statutory disqualification to effect or be involved in effecting security-based swaps on the SBS Entity's behalf.[1491]

The Commission has previously noted the potential complexities associated with identifying transactions of a dealer that it arranges, negotiates, or executes by personnel located in the United States under Rule 3a71–3(b)(1)(iii)(C),[1492] which requires a non-

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[1481] *See* Exchange Act rule 3a71–6(c)(2)(ii).

[1482] *See* Exchange Act rule 15Fb2–4(c). Under that rule, the certification must state that the entity "can, as a matter of law, and will" provide such access to the Commission, while the opinion of counsel only says that the entity "can, as a matter of law" provide such a certification.

As noted, although commenters to the Cross-Border Proposing Release had questioned such direct access on deference-related grounds, the Commission subsequently adopted a final rule requiring those certifications and opinions of counsel as prerequisites to registration by nonresident entities. *See* notes 1408 and 1409, *supra*. In adopting that prerequisite, we noted our belief that "significant elements of an effective regulatory regime are the Commission's abilities to access registered SBS Entities' books and records and to inspect and examine the operations of registered SBS Entities." *See* Registration Adopting Release, 80 FR at 48981, *supra* note 989.

[1483] The final rule, in contrast to the proposal, states that the party must provide the certification and opinion of counsel "as if the party were subject to that requirement at the time of the request." Because the requirements of rule 15Fb2–4(c) are imposed on an entity applying for registration with the Commission, the addition of that language should facilitate the ability of an entity to apply for substituted compliance before the entity is required to register with the Commission as a security-based swap dealer or as a major security-based swap participant.

[1484] *See* Exchange Act rule 3a71–6(c)(3). As noted above, the final rule has been modified from the proposal to permit foreign financial regulatory authorities to submit substituted compliance applications, necessitating the addition of this prerequisite to applications by such authorities.

[1485] While applications by foreign financial regulatory authorities must include such adequate assurances, the rule does not specifically require those applications to be accompanied by opinions of counsel (in contrast to applications submitted by entities that seek to rely on substituted compliance). Opinions of counsel, however, provide one possible way in which such authorities may provide the necessary adequate assurances.

[1486] *See* Exchange Act rule 0–13(e).

[1487] *See* Section II.H.9 (Certain Political Contributions by SBS Dealers), *supra*, discussing, among other things, how Rule 15Fh–6 applies to contributions made before the SBS Dealer registered with the Commission as such as well as how the rule's "look back" provision will not apply to contributions made before the compliance date of the rule by newly covered associates to which the look back applies.

[1488] *See* Registration Adopting Release, *supra* note 989.

[1489] The Commission previously has proposed rules to establish capital, margin and segregation requirements for SBS Entities. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213 (Nov. 23, 2012).

[1490] The Commission previously has proposed rules to establish recordkeeping and reporting requirements for SBS Entities. *See* Recordkeeping Release, 79 FR 25193, *supra* note 242.

[1491] *See* Registration Adopting Release, *supra* note 989.

[1492] *See* U.S. Activity Adopting Release, 81 FR 8636–37.

U.S.-person dealer to include such transactions in its *de minimis* threshold calculations. In the U.S. Activity Adopting Release, the Commission specified that the compliance date for that rule is "the later of (a) 12 months following publication in the **Federal Register**, or (b) the SBS Entity Counting Date."[1493] Because the Commission believes similar potential complexities exist with respect to such transactions that are included in "U.S. business" as defined in final Rule 3a71–3(a)(8)(i)(B), the Commission is adopting a compliance date for application of customer protection requirements described in final Rule 3a71–3(c) to transactions described under final Rule 3a71–3(a)(8)(i)(B) that is the later of (a) 12 months following publication in the **Federal Register**, or (b) the Registration Compliance Date.

The Commission believes that these timing requirements should provide firms with adequate time to review the business conduct rules being adopted today and make appropriate business decisions before being required to comply with the requirements of the rules.

C. Application to Substituted Compliance

For the substituted compliance provisions of Rule 3a71–6, the Commission similarly is adopting an effective date of 60 days following publication in the **Federal Register**. There will be no separate compliance date in connection with that rule, as the rule does not impose obligations upon entities separate and apart from the underlying business conduct requirements. As discussed above, security-based swap dealers and major security-based swap participants will not be required to comply with the business conduct requirements until they are registered, and the registration requirement for those entities will not be triggered until a number of regulatory benchmarks have been met.

In practice, the Commission recognizes that if the requirements of a foreign regime are comparable to Title VII requirements, and the other prerequisites to substituted compliance also have been satisfied, then it may be appropriate to permit a security-based swap dealer or major security-based swap participant to rely on substituted compliance commencing at the time that entity is registered with the Commission. Accordingly, the Commission would consider substituted compliance requests that are submitted prior to the compliance date for the entity registration requirements.

V. Paperwork Reduction Act

Certain provisions of the Rules impose new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1494] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget ("OMB") for review when it issued the Proposing Release. The titles for these collections are "Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants," and "Designation of Chief Compliance Officer of Security-Based Swap Dealers and Major Security-Based Swap Participants."

Compliance with collection of information requirements is mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB assigned control number 3235–0732 to the new collections of information.

In the Proposing Release, the Commission requested comment on the collection of information requirements contained therein, as well as the accuracy of the Commission's related estimates and statements regarding the associated costs and burdens of the proposed rules. As noted above, the Commission received 43 comment letters addressing the Proposing Release, as well as those portions of the Cross-Border Proposing Release that referenced the proposed rules governing business conduct standards for security-based swap dealers. Although none of the comment letters specifically addressed the Commission's estimates for the proposed collection of information requirements, the views of commenters relevant to the Commission's analysis of burdens, costs, and benefits of the proposed rules are discussed in Section IV.C, below.

The Commission continues to believe that the methodology used for calculating the burdens set forth in the Proposing Release is appropriate. However, where noted, certain estimates have been modified, as necessary, to conform to the adopted rules and to reflect the most recent data available to the Commission. Other than these changes, the Commission's estimates remain unchanged from those in the Proposing Release.

As a part of this release, the Commission also is adopting Rule 3a67–10(d) and Rule 3a71–3(c), which among other things, provide an exception to certain of the business conduct standards described in section 15F(h) of the Act, and the rules and regulations thereunder, to registered Major SBS Participants and registered SBS Dealers in certain transactions conducted through the foreign branch of their U.S.-person counterparty. As part of the process of availing themselves of this exception, registered Major SBS Participants (in the case of Rule 3a67–10(d)) and registered SBS Dealers (in the case of Rule 3a71–3(c)) would be permitted to rely on certain representations provided to them by their counterparties regarding whether a transaction is conducted through a foreign branch. The requirements regarding those representations are contained in Rule 3a71–3(a)(3)(ii). The Commission previously published a notice requesting comment on the collection of information requirements in Rule 3a71–3 as part of the Cross-Border Proposing Release, and submitted those proposed collection of information requirements to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the collection of information related to the representation in Rule 3a71–3 is "Reliance on Counterparty Representations Regarding Activity Within the United States." OMB has not yet assigned a control number to this collection.

The Commission also is adopting Rule 3a71–6 to provide for substituted compliance in connection with the business conduct requirements. As proposed, the title of the information collection associated with that rule was "Rule 3a71–5 Substituted Compliance for Foreign Security-Based Swap Dealers."[1495] The OMB assigned control number 3235–0715 to the new collection of information. In the Cross-Border Proposing Release, the Commission solicited comment on the collection of information requirements associated with the substituted compliance rule and on the accuracy of the Commission's related statements. The Commission received no comments on those proposed information collection requirements.

[1493] *Id.*

[1494] 44 U.S.C. 3501 *et seq.*

[1495] Consistent with the renumbering of the rule and the potential availability of substituted compliance to Major SBS Participants, the revised title of the collection of information is "Rule 3a71–6 Substituted Compliance for Foreign Security-Based Swap Entities."

A. Summary of Collections of Information

1. Definitions

Rule 15Fh–2(d) defines a "special entity" as: (1) A Federal agency; (2) a State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State; (3) any employee benefit plan subject to Title I of ERISA; (4) any employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a special entity, unless such employee benefit plan elects not to be a special entity by notifying an SBS dealer or Major SBS Participant of its election prior to entering into a security-based swap; (5) any governmental plan, as defined in Section 3(32) of ERISA; or (6) any endowment, including organizations described in Section 501(c)(3) of the Internal Revenue Code.

The proposed rule included employee benefit plans "defined in" ERISA within the special entity definition. The final rule similarly includes employee benefit plans "defined in" ERISA that are not otherwise "subject to" ERISA within the special entity definition, although it provides such benefit plans with the ability to opt out of special entity status.

2. Verification of Status

Rule 15Fh–3(a)(1) requires an SBS Entity to verify that a counterparty meets the eligibility standards for ECP status before entering into a security-based swap with that counterparty other than with respect to a transaction executed on a registered national securities exchange.

Rule 15Fh–3(a)(2) requires an SBS Entity to verify whether a counterparty is a special entity before entering into a security-based swap transaction with that counterparty, unless the transaction is executed on a registered or exempt SEF or registered national securities exchange, and the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to the transaction to permit the SBS Entity to comply with the obligations of the rule.

Rule 15Fh–3(a)(3) requires an SBS Entity, in verifying the special entity status of a counterparty pursuant to Rule 15Fh–3(a)(2), to verify whether a counterparty is eligible to elect not to be a special entity as provided for in the adopted special entity definition in Rule 15Fh–2(d)(4), and if so, to notify such counterparty of its right to make such an election. An SBS Entity may satisfy these verification requirements through any reasonable means including, among other things, by obtaining written representations from the counterparty as to specific facts about the counterparty.[1496]

3. *Disclosures by SBS Entities*

Rule 15Fh–3(b) generally requires an SBS Entity at a reasonably sufficient time prior to entering into a security-based swap to disclose to a counterparty (other than an SBS Entity or Swap Entity) material information concerning the security-based swap in a manner reasonably designed to allow the counterparty to assess: (1) The material risks and characteristics of a particular security-based swap; and (2) any material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. These disclosure requirements do not apply unless the identity of the counterparty is known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule. The rule also requires the SBS Entity to make a written record of any non-written disclosures made pursuant to this provision, and timely provide a written version of these disclosures to counterparties no later than the delivery of the trade acknowledgement of the particular transaction.

Rule 15Fh–3(c)(1), for cleared security-based swaps, requires an SBS Entity to, upon request of the counterparty, disclose the daily mark to the counterparty (other than an SBS Entity or Swap Entity). The daily mark that the SBS Entity receives from the appropriate clearing agency. Rule 15Fh–3(c)(2), for uncleared security-based swaps, requires an SBS Entity to disclose the daily mark to the counterparty, which is the midpoint between the bid and offer, or the calculated equivalent thereof, as of the close of business, unless the parties agree in writing to a different time, on each business day during the term of the security-based swap. Rule 15Fh–3(c)(2) also requires disclosure of the data sources and a description of the methodology and assumptions used to prepare the daily mark for an uncleared security-based swap, as well as disclosure of any material changes to such data sources, methodology or assumptions during the term of the security-based swap. Rule 15Fh–3(c)(1) and (2) also require an SBS Entity to provide the daily mark without charge to the counterparty and without restrictions on the internal use of the daily mark by the counterparty.

Rule 15Fh–3(d) requires an SBS Entity to disclose information regarding clearing rights to its counterparties (other than an SBS Entity or Swap Entity), so long as the identity of the counterparty is known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rule. Pursuant to the rule, before entering into a security-based swap that is subject to the clearing requirements of Section 3C(a) of the Exchange Act, the SBS Entity shall disclose to the counterparty the names of the clearing agencies that accept the security-based swap for clearing, and through which of those clearing agencies the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap; disclose to the counterparty whether any of the named clearing agencies satisfy the standard for clearing under Section 3C(a)(1) of the Exchange Act; and notify the counterparty that it shall have the sole right to select which clearing agency shall be used to clear the security-based swap. For security-based swaps, not subject to the clearing requirements of Section 3C(a) of the Exchange Act, before entering into a security-based swap, the SBS Entity shall determine whether the security-based swap is accepted for clearing by one or more clearing agencies; disclose to the counterparty the names of the clearing agencies that accept the security-based swap for clearing, and whether the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap through such clearing agencies; and notify the counterparty that it may elect to require clearing of the security-based swap and shall have the sole right to select the clearing agency at which the security-based swap will be cleared, provided it is a clearing agency at which the SBS Entity is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap. To the extent that the disclosures required by Rule 15Fh–3(d) are not provided in writing prior to the execution of the transaction, the SBS Entity is required to make a written record of the non-written disclosures and provide the counterparty with a written version of these disclosure no later than the delivery of the trade acknowledgement for the transaction.

[1496] The Commission separately has proposed rules regarding recordkeeping and reporting requirements for SBS Entities that would require an SBS Entity to keep records of its verification. *See* Recordkeeping Release, 79 FR 25193, 25208 and 25217–25218, supra note 242.

4. Know Your Counterparty and Recommendations

Rule 15Fh–3(e) requires an SBS Dealer to establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the SBS Dealer that are necessary for conducting business with such counterparty. The essential facts are: (1) Facts required to comply with applicable laws, regulations and rules; (2) facts required to implement the SBS Dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and (3) information regarding the authority of any person acting for such counterparty.

Rule 15Fh–3(f)(1) requires an SBS Dealer recommending a security-based swap or trading strategy involving a security-based swap to a counterparty (other than an SBS Entity or a Swap Entity) to: (i) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommendation; and (ii) have a reasonable basis to believe that the recommendation is suitable for the counterparty. To establish a reasonable basis for a recommendation, an SBS Dealer must have or obtain relevant information regarding the counterparty, including the counterparty's investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy involving a security-based swap.

Under Rule 15Fh–3(f)(2), an SBS Dealer may also fulfill its suitability obligations under Rule 15Fh–3(f)(1)(ii) with respect to an institutional counterparty (defined as a counterparty that is an eligible contract participant as defined in clauses (A)(i), (ii), (iii), (iv), (viii), (ix) or (x), or clause (B)(ii) (other than a person described in clause (A)(v)) of Section 1a(18) of the Commodity Exchange Act and the rules and regulations thereunder, or any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million) if: (i) The SBS Dealer reasonably determines that the counterparty (or its agent) is capable of independently evaluating the investment risks with regard to the relevant security-based swap or trading strategy involving a security-based swap; (ii) the counterparty (or its agent) affirmatively represents in writing that it is exercising its independent judgment in evaluating the recommendations of the SBS Dealer with regard to the relevant security-based swap or trading strategy; and (iii) the SBS Dealer discloses to the counterparty that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the security-based swap or trading strategy for the counterparty. Under Rule 15Fh–3(f)(3), an SBS Dealer will be deemed to have satisfied the requirements of Rule 15Fh–3(f)(2)(i) if it receives written representations, as provided in Rule 15Fh–1(b), that: (i) In the case of a counterparty that is not a special entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; and (ii) in the case of a counterparty that is a special entity, satisfy the terms of the safe harbor in Rule 15Fh–5(b).

5. Fair and Balanced Communications

Rule 15Fh–3(g) requires an SBS Entity to communicate with its counterparties in a fair and balanced manner based on principles of fair dealing and good faith. The rule requires that: (1) Communications provide a sound basis for evaluating the facts with regard to a particular security-based swap or trading strategy involving a security-based swap; (2) communications not imply that past performance will recur or make any exaggerated or unwarranted claim, opinion, or forecast; and (3) any statement referring to potential opportunities or advantages presented by a particular security-based swap be balanced by an equally detailed statement of the corresponding risks.

6. Supervision

Rule 15Fh–3(h) requires an SBS Entity to establish and maintain a system to supervise, and to diligently supervise, its business and the activities of its associated persons. Such a system shall be reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder relating to its business as an SBS Entity. At a minimum, the supervisory system must: (i) Designate at least one person with authority to carry out supervisory responsibilities for each type of business in which the SBS Entity engages for which registration as an SBS Entity is required; (ii) use reasonable efforts to determine all such supervisors are qualified, either by virtue of experience or training, to carry out their assigned responsibilities; and (iii) establish, maintain and enforce written policies and procedures addressing the supervision of the types of security-based swap business in which the SBS Entity is engaged and the activities of it associated persons that are reasonably designed to prevent violations of applicable securities laws and rules and regulations thereunder.

Such written policies and procedures must include, at a minimum, procedures: (a) For the review by a supervisor of transactions for which registration as an SBS Entity is required; (b) for the review by a supervisor of incoming and outgoing written (including electronic) correspondence with counterparties or potential counterparties and internal written communications relating to the SBS Entity's security-based swap business; (c) for a periodic review, at least annually, of the security-based swap business in which the SBS Entity engages that is reasonably designed to assist in detecting and preventing violations of applicable federal securities laws and regulations; (d) to conduct a reasonable investigation regarding the good character, business repute, qualifications, and experience of any person prior to that person's association with the SBS Entity; (e) to consider whether to permit an associated person to establish or maintain a securities or commodities account or a trading relationship in the name of, or for the benefit of, such associated person at another financial institution, and if permitted, to supervise the trading at such institution; (f) describing the supervisory system, including the titles, qualifications and locations of supervisory persons and the responsibilities of each supervisory person with respect to the types of business in which the SBS Entity is engaged; (g) prohibiting an associated person who performs a supervisory function from supervising his or her own activities or reporting to, or having his or her compensation or continued employment determined by, a person or persons he or she is supervising; provided that if the SBS Entity determines, with respect to any of its supervisory personnel, that compliance with this requirement is not possible because of the firm's size or a supervisory person's position within the firm, then the SBS Entity must document the factors used to reach such determination and how the supervisory arrangement otherwise complies with this rule, and include a summary of such determination in the annual compliance report prepared by the SBS Entity's CCO pursuant to Rule 15Fk–1(c); (h) reasonably designed to prevent the supervisory system from being compromised due to conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the SBS Entity, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised; and (i) reasonably designed, taking into consideration the nature of the SBS Entity's business, to comply with the duties set forth in Section 15F(j) of the Exchange Act.

Rule 15Fh–3(h)(3) provides that an SBS Entity (or associated person of an SBS Entity) will not be deemed to have failed to diligently supervise another person if that person is not subject to his or her supervision, or if: (i) The SBS Entity has established and maintained written policies and procedures (as required in Rule15Fh–3(h)(2)(iii)), and a documented system for applying those policies and procedures that would reasonably be expected to prevent and detect, insofar as practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to security-based swaps; and (ii) the SBS Entity or associated person has reasonably discharged the duties and obligations required by such written policies and procedures and documented system and did not have a reasonable basis to believe that such written policies and procedures and documented system were not being followed.

Rule 15Fh–3(h)(4) provides that an SBS Entity must also promptly amend its written supervisory procedures as appropriate when material changes occur in applicable securities laws, rules, or regulations thereunder, as well as when material changes occur in its business or supervisory system, and promptly communicate any material amendments to its supervisory procedures to all associated persons to whom such amendments are relevant based on their activities and responsibilities.

7. SBS Dealers Acting as Advisors to Special Entities

Rule 15Fh–4(b)(1) imposes the duty on an SBS Dealer that acts as an advisor to a special entity regarding a security-based swap to make a reasonable determination that any security-based swap or trading strategy involving a security-based swap recommended by the SBS Dealer is in the best interests of the special entity. Paragraph (b)(2) also requires an SBS Dealer acting as an advisor to a special entity to make reasonable efforts to obtain such information as it considers necessary to make a reasonable determination that a security-based swap or related trading strategy is in the best interests of the special entity. The information that must be obtained to make this reasonable determination includes, but is not limited to: (i) The authority of the special entity to enter into a security-based swap; (ii) the financial status and future funding needs of the special entity; (iii) the tax status of the special entity; (iv) the hedging, investment, financing or other objectives of the special entity; (v) the experience of the special entity with respect to security-based swaps, generally, and security-based swaps of the type and complexity being recommended; (vi) whether the special entity has the financial capability to withstand changes in market conditions during the term of the security-based swap; and (vii) such other information as is relevant to the particular facts and circumstances of the special entity, market conditions and the type of security-based swap or trading strategy being recommended. However, the requirements of Rule 15Fh–4(b) do not apply to a security-based swap if: (i) The transaction is executed on a registered or exempt SEF or a registered national securities exchange; and (ii) the SBS Dealer does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Dealer to comply with the obligations of this rule.

Rule 15Fh–2(a) generally provides that an SBS Dealer acts as an advisor to a special entity when it recommends a security-based swap or security-based swap trading strategy to that special entity. Rule 15Fh–2(a)(1) provides a safe harbor under which an SBS Dealer will not be deemed to act as an advisor to a special entity that is subject to Title I of ERISA if: (i) The special entity represents in writing that it has a fiduciary as defined in Section 3 of ERISA that is responsible for representing the special entity in connection with the security-based swap; (ii) the fiduciary represents in writing that it acknowledges that the SBS Dealer is not acting as an advisor; and (iii) the special entity represents in writing that (a) it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the special entity receives from the SBS Dealer involving a security-based swap transaction is evaluated by a fiduciary before it is entered into; or (b) that any recommendation the special entity receives from the SBS Dealer involving a security-based swap transaction will be evaluated by a fiduciary before the transaction is entered into.[1497]

Rule 15Fh–2(a)(2) provides a safe harbor for transactions between an SBS Dealer and any special entity. Under this rule, an SBS Dealer that recommends a security-based swap or security-based swap trading strategy to any special entity (other than a special entity subject to Title I of ERISA) will not be deemed to act as an advisor to that special entity if the special entity represents in writing that it acknowledges that the SBS Dealer is not acting as an advisor, and that it will rely on advice from a qualified independent representative, as defined in Rule 15Fh–5(a). The SBS Dealer must also disclose to the special entity that it is not undertaking to act in the best interests of the special entity, as otherwise required by Section 15F(h)(4) of the Exchange Act.[1498]

8. SBS Entities Acting as Counterparties to Special Entities

Rule 15Fh–5(a)(1) requires an SBS Entity that offers to enter into or enters into a security-based swap with a special entity (other than a special entity that is an employee benefit plan subject to Title I of ERISA), to have a reasonable basis to believe that the special entity has a qualified independent representative that meets certain specified qualifications. For purposes of Rule 15Fh–5(a)(1), a qualified independent representative must: (i) Have sufficient knowledge to evaluate the transaction and related risks; (ii) not be subject to a statutory disqualification; (iii) undertake a duty to act in the best interests of the special entity; (iv) make appropriate and timely disclosures to the special entity of material information concerning the security-based swap; (iv) evaluate, consistent with any guidelines provided by the special entity, the fair pricing and appropriateness of the security-based swap; (v) in the case of a special entity defined in Rule 15Fh–2(d)(2) or (5), be subject to the pay-to-play prohibitions of the Commission, the CFTC, or a self-regulatory organization that is subject to the jurisdiction of the Commission or the CFTC (unless the independent representative is an employee of the special entity); and (vii) be independent of the SBS Entity that is the counterparty to a proposed security-based swap.[1499]

Rule 15Fh–5(a)(1) also provides that a representative of a special entity will be "independent" of an SBS Entity if the representative does not have a relationship with the SBS Entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative.[1500] In addition, a special entity's representative will be deemed to be "independent" of an SBS Entity if: (1) The representative is not and was not an associated person of the SBS Entity within one year of representing the special entity in connection with the security-based swap; (2) the representative provides timely disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the special entity, and complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest; and (3) the SBS Entity did not refer, recommend, or introduce the representative to the special entity within one year of the representative's representation of the special entity in connection with the security-based swap.[1501]

[1497] Rule 15Fh–2(a)(1).

[1498] Rule 15Fh–2(a)(2).

[1499] Rule 15Fh–5(a)(1)(vii).

Rule 15Fh–5(a)(2) provides that an SBS Entity that offers to enter into or enters into a security-based swap with a special entity as defined in Rule 15Fh–2(d)(3) (any employee benefit plan that subject to Title I of ERISA) must have a reasonable basis to believe the special entity has a representative that is a fiduciary as defined in Section 3 of ERISA.

Rule 15Fh–5(b) provides safe harbors for SBS Dealers seeking to form a reasonable basis regarding the qualifications of the independent representative. Under Rule 15Fh–5(b)(1), an SBS Entity shall be deemed to have a reasonable basis to believe that a special entity (other than an ERISA special entity) has a representative that satisfies the requirements of Rule 15Fh–5(a)(1) if: (i) The special entity represents in writing to the SBS Entity that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the requirements of Rule 15Fh–5(a)(1), and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with Rule 15Fh–5(a)(1); and (ii) the representative represents in writing to the special entity and the SBS Entity that the representative: (a) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of Rule 15Fh–5(a)(1); (b) meets the independence requirements of Rule 15Fh–5(a)(1)(vii); and (c) is legally obligated to comply with the requirements of Rule 15Fh–5(a)(1) by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

Under Rule 15Fh–5(b)(2), an SBS Entity shall be deemed to have a reasonable basis to believe that an ERISA special entity has a representative that satisfies the requirements of Rule 15Fh–5(a)(2), provided that the special entity provides in writing to the SBS Entity the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of ERISA.

Under Rule 15Fh–5(c), before initiation of a security-based swap, an SBS Dealer must disclose to the special entity in writing the capacity in which the SBS Dealer is acting in connection with the security-based swap, and, if the SBS Dealer engages in business with the counterparty in more than one capacity, the SBS Dealer must disclose the material differences between such capacities and any other financial transaction or service involving the counterparty to the special entity.

Under Rule 15Fh–5(d), formerly Rule 15Fh–5(c), the provisions of Rule 15Fh–5 do not apply when two conditions are satisfied: (1) The transaction is executed on an registered or exempt SEF or registered national securities exchange; and (2) the SBS Entity is unaware of the counterparty's identity, at a reasonably sufficient time prior to the execution of the transaction to permit the SBS Entity to comply with the obligations of the rule.

9. Political Contributions

Rule 15Fh–6(b) prohibits an SBS Dealer from offering to enter into, or entering into a security-based swap, or a trading strategy involving a security-based swap, with a municipal entity within two years after any contribution by the SBS Dealer or its covered associates to an official of such municipal entity, subject to certain exceptions. These prohibitions do not apply to certain contributions made by an SBS Dealer's covered associate if the SBS Dealer discovered the contribution within 120 calendar days of the date of such contribution, the contribution did not exceed $350, and the covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the SBS Dealer. However, a SBS dealer may not rely on that provision more than three times in any 12-month period if it has more than 50 covered associated, and no more than twice if it has 50 or fewer covered associates. The Commission may also, upon application, exempt a security-based swap dealer from the prohibitions of the rule after consideration of several factors.

The provisions of Rule 15Fh–6 do not apply when two conditions are satisfied: (1) The transaction is executed on an registered or exempt SEF or registered national securities exchange; and (2) the SBS Dealer is unaware of the counterparty's identity, at a reasonably sufficient time prior to the execution of the transaction to permit the SBS Dealer to comply with the obligations of the rule.

10. Chief Compliance Officer

Rule 15Fk–1 requires an SBS Entity to designate an individual to serve as CCO on its registration form. Under Rule 15Fk–1(b)(1) the CCO must report directly to the board of directors or senior officer of the SBS Entity. Under Rule 15Fk–1(b)(2), the CCO must take reasonable steps to ensure that the SBS Entity establishes, maintains, and reviews written policies and procedures reasonably designed to achieve compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity by: (1) Reviewing the SBS Entity's compliance with the SBS Entity requirements described in Section 15F of the Exchange Act and the rules and regulations thereunder (where such review shall involve preparing the SBS Entity's annual assessment of its written policies and procedures reasonably designed to achieve compliance with Section 15F of the Exchange Act and the rules and regulations thereunder); (2) taking reasonable steps to ensure the SBS Entity establishes, maintains, and reviews policies and procedures reasonably designed to remediate non-compliance issues identified by the CCO through any means, including any compliance office review, look-back, internal or external audit finding, self-reporting to the Commission and other appropriate authorities, or complaint that can be validated; and (3) taking reasonable steps to ensure that the SBS Entity establishes and follows procedures reasonably designed for the handling, management response, remediation, retesting, and resolution of non-compliance issues. Under Rule 15Fk–1(b)(3), the CCO must take reasonable steps to resolve any material conflicts of interest that may arise, in consultation with the board or the senior officer of the SBS Entity. Under Rule 15Fk–1(b)(4), the CCO must administer each policy and procedure that is required to be established pursuant to Section 15F of the Exchange Act and the rules and regulations thereunder.

[1500] Rule 15Fh–5(a)(1)(vii)(A).

[1501] Rule 15Fh–5(a)(1)(vii)(B).

Under Rule 15Fk–1(c), the CCO must also prepare and sign an annual compliance report that must be submitted to the Commission within 30 days following the deadline for filing the SBS Entity's annual financial report with the Commission pursuant to Section 15F of the Exchange Act and the rules and regulations thereunder. This annual compliance report must contain a description of the written policies and procedures of the SBS Entity described in Rule 15Fk–1(b), outlined above, including the code of ethics and conflict of interest policies. The compliance report must also include, at a minimum, a description of: (1) The SBS Entity's assessment of the effectiveness of its policies and procedures relating to its business as an SBS Entity; (2) any material changes to the policies and procedures since the date of the preceding compliance report; (3) any areas for improvement and recommended potential or prospective changes or improvements to its compliance program and resources devoted to compliance; (4) any material non-compliance matters identified; and (5) the financial, managerial, operational, and staffing resources set aside for compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity, including any material deficiencies in such resources. The report must be submitted to the board of directors and audit committee (or equivalent bodies) and the senior officer of the SBS Entity prior to submission to the Commission. The report also must be discussed in one or more meetings (addressing the obligations of this rule) that were conducted by the senior officer with the CCO in the preceding 12 months, and must include a certification by the CCO or senior officer that, to the best of his or her knowledge and reasonable belief and under penalty of law, the information contained in the compliance report is accurate and complete in all material respects.

The final rule allows an SBS Entity to incorporate by reference sections of a compliance report that has been submitted with the current or immediately preceding reporting period to the Commission, and allows an SBS Entity to request from the Commission an extension of time to submit its compliance report, provided that the SBS Entity's failure to timely submit the report could not be eliminated by the SBS Entity without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission. The final rule also requires an SBS Entity to promptly submit an amended compliance report if material errors or omissions in the report are identified.

Under Rule 15k–1(d), the compensation and removal of the CCO shall require the approval of a majority of the board of directors of the SBS Entity.

11. Foreign Branch Exception

Rule 3a67–10(d), as adopted, provides that registered major security-based swap participants shall not be subject to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act, in certain transactions conducted through the foreign branch of their U.S.-person counterparty. Rule 3a71–3(c), as adopted, provides a similar exception for registered security-based swap dealers. The previously adopted definition of "transaction conducted through a foreign branch" permits a person to rely on its U.S. bank counterparty's representation that the transaction "was arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate."[1502]

12. Substituted Compliance Rule

Rule 3a71–6, as adopted, provides that the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under such foreign financial regulatory system by a registered non-U.S. SBS Entity, or class thereof, may satisfy certain business conduct requirements by complying with the comparable foreign requirements. The availability of substituted compliance would be predicated on a determination by the Commission that the relevant foreign requirements are comparable to the requirements that otherwise would be applicable, taking into account the scope and objectives of the relevant foreign requirements,[1503] and the effectiveness of supervision and enforcement under the foreign regulatory regime.[1504] The availability of substituted compliance further would be predicated on there being a supervisory and enforcement MOU or other arrangement between the Commission and the relevant foreign authority addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.[1505]

Requests for substituted compliance may come from parties or groups of parties that may rely on substituted compliance, or from foreign financial authorities supervising such parties or their security-based swap activities.[1506] Under the final rule, the Commission would make any determinations with regard to the applicable business conduct requirements, rather than on a firm-by-firm basis. Once the Commission has made a substituted compliance determination, other similarly situated market participants would be able to rely on that determination to the extent applicable and subject to any corresponding conditions. Accordingly, the Commission expects that requests for a substituted compliance determination would be made only where an entity seeks to rely on particular requirements of a foreign jurisdiction that has not previously been the subject of a substituted compliance request. The Commission believes that this approach would substantially reduce the burden associated with requesting substituted compliance determinations for an entity that relies on a previously issued determination, and, therefore, complying with the Commission's rules and regulations more generally.

As provided by Exchange Act Rule 0–13, which the Commission adopted in 2014, applications for substituted compliance determinations in connection with these requirements must be accompanied by supporting documentation necessary for the Commission to make the determination, including information regarding applicable requirements established by the foreign financial regulatory authority or authorities, as well as the methods used by the foreign financial regulatory authority or authorities to monitor and enforce compliance with such rules, and to cite to and discuss applicable precedent.[1507]

[1502] *See* Exchange Act rule 3a71–3(a)(3)(ii).

[1503] In the specific context of substituted compliance for the business conduct requirements, prior to making any comparability determination the Commission intends to consider whether the information that is required to be provided to counterparties pursuant to the requirements of the foreign jurisdiction, the counterparty protections under the requirements of the foreign jurisdiction, the mandates for supervisory systems under the requirements of the foreign jurisdiction, and the CCO requirements under the foreign jurisdiction are comparable with the applicable Exchange Act provisions. *See* Exchange Act Rule 3a71–6(d).

[1504] *See* Exchange Act Rule 3a71–6(a)(2)(i).

[1505] *See* Exchange Act Rule 3a71–6(a)(2)(ii).

[1506] *See* Exchange Act Rule 3a71–6(c)(1). Such parties or groups of parties may make requests only if each such party or its activities is directly supervised by the foreign financial authority. *See* Exchange Act Rule 3a71–6(c)(2).

B. Use of Information

1. Verification of Status

Rule 15Fh–3(a) requires an SBS Entity to verify that a counterparty meets the eligibility standards for ECP status before offering to enter into or entering into a security-based swap other than with respect to a transaction executed on a registered national securities exchange. The SBS Entity will use this information to comply with Section 6(l) of the Exchange Act (15 U.S.C. 78(f)(l)), which prohibits a person from entering into a security-based swap with a counterparty that is not an ECP other than on a registered national securities exchange. The rule also requires the SBS Entity to verify, for non-anonymous transactions, whether a counterparty is a special entity before entering into a security-based swap transaction with that counterparty, unless the transaction is executed on a registered or exempt security-based swap execution facility or registered national securities exchange. The SBS Entity will use this information to assess its need to comply with the requirements applicable to dealings with special entities under Rules 15Fh–4(b) and 15Fh–5. In addition, the Commission staff may review this information in connection with examinations and investigations.

2. Disclosures by SBS Entities

The disclosures that SBS Entities must provide to a counterparty (other than an SBS Entity or a Swap Entity) will help the counterparty understand the material risks and characteristics of a particular security-based swap, as well as the material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. As a result, these disclosures will assist the counterparty in assessing the transaction by providing them with a better understanding of the expected performance of the security-based swap under various market conditions. The disclosures will also give counterparties additional transparency and insight into the pricing and collateral requirements of security-based swaps.

Rule 15Fh–3(d) requires SBS Entities, before entering into a security-based swap with a counterparty (other than an SBS Entity or Swap Entity), to determine whether the security-based swap is subject to the clearing requirements of Section 3C(a) of the Exchange Act and to disclose its determination to counterparties, along with certain information regarding the clearing alternatives available to them. In addition to assisting the SBS Entity and its CCO in supervising and assessing internal compliance with the statute and rules, the Commission staff may also review this information in connection with examinations and investigations.

3. Know Your Counterparty and Recommendations

These collections of information will help SBS Dealers comply with applicable laws, regulations and rules, as well as assist SBS Dealers in effectively dealing with counterparties. For example, these collections of information may better enable SBS Dealers to make appropriate recommendations for counterparties, and to gather from the counterparty any information that the SBS Dealer needs for credit and risk management purposes. Furthermore, these collections of information will assist SBS Dealers in determining whether it is reasonable to rely on various representations from a counterparty, and in evaluating the risks of trading with that counterparty. The information will also assist a CCO in determining whether the SBS Entity has written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each known counterparty, and to make suitable recommendations to its counterparties. The Commission staff may also review this information in connection with examinations and investigations.

4. Fair and Balanced Communications

The collection of information concerning the risks of a security-based swap will assist an SBS Entity in communicating with counterparties in a fair and balanced manner by requiring, among other things, that communications provide a sound basis for evaluating the facts with regard to a particular security-based swap and, if a statement refers to potential opportunities or advantages presented by a particular security-based swap, that statement must be balanced by an equally detailed statement of corresponding risks. It will also help the CCO in ensuring that the SBS Entity is communicating with counterparties in a fair and balanced manner based on principles of fair dealing and good faith by establishing certain express requirements with which these communications must comply. Acting on the basis of fair and balanced information, the counterparty will also be better equipped to make more informed investment decisions. The Commission staff may also review this information in connection with examinations and investigations.

5. Supervision

The requirement to establish and maintain a reasonably designed system to supervise, and to diligently supervise, the business and the activities of associated persons will assist an SBS Entity in preventing violations of the applicable securities laws, rules and regulations related to the business of an SBS Entity. The CCO may use this information in discharging his or her duties under Rule 15Fk–1 and in determining whether remediation efforts are required. The collection of information will also be useful to supervisors in understanding and carrying out their supervisory responsibilities. The Commission staff may also review this information in connection with examinations and investigations.

6. SBS Dealers Acting as Advisors to Special Entities

Certain information collected under Rule 15Fh–4(b) will help SBS Dealers that act as advisors to special entities to make a reasonable determination that they are acting in the best interests of those special entities.

Other information collected under Rule 15Fh–2(a) will help SBS Dealers establish that they are not acting as advisors to special entities.

These collections of information will also assist CCOs in determining whether an SBS Dealer has complied with relevant provisions of the Exchange Act, as well as the rules and regulations thereunder. The Commission staff may also review this information in connection with examinations and investigations.

7. SBS Entities Acting as Counterparties to Special Entities

The information collected under Rule 15Fh–5(a) will assist an SBS Entity in forming a reasonable basis to believe that a special entity has a qualified independent representative that meets the requirements of the rule.

[1507] *See* Exchange Act Rule 0–13(e). Rule 0–13 also specifies other prerequisites for the filing of substituted compliance applications (*e.g.*, requirements regarding the use of English, the use of electronic or paper requests, contact information, and public notice and comment in connection with complete applications).

In adopting Rule 0–13, the Commission also noted that because Rule 0–13 was a procedural rule that did not provide any substituted compliance rights, "collections of information arising from substituted compliance requests, including associated control numbers, [would] be addressed in connection with any applicable substantive rulemakings that provide for substituted compliance." *See* SBS Entity Definitions Adopting Release, 79 FR at 47366 n.778, *supra* note 1451.

The written representations required under Rule 15Fh–5(b) will assist in, and provide a safe harbor for, an SBS Entity forming a reasonable basis as to the qualifications of the independent representative, including representations that: (i) The special entity has complied in good faith with written policies and procedures reasonably designed to ensure its representative satisfies the requirements of Rule 15Fh–5(a)(1), and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with Rule 15Fh–5(a)(1); and that (ii) the representative has policies and procedures designed to ensure that it satisfies the requirements of Rule 15Fh–5(a)(1); meets the requirements of Rule 15Fh–5(a)(1)(i), (ii), (iii), (vi) and (vii); and is legally obligated to comply with the requirements of Rule 15Fh–5(a)(1) by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

Disclosures under Rule 15Fh–5(c) regarding the capacity in which an SBS Dealer is acting in connection with a security-based swap will provide additional transparency to special entities as to any material differences between the SBS Dealer's capacities and any other financial transaction or service involving the counterparty to the special entity, such as when an SBS Dealer is acting as a counterparty or principal on the other side of a transaction with potentially adverse interests.

These collections of information will also assist a CCO in assessing the SBS Entity's compliance with relevant provisions of the Exchange Act. The Commission staff may also review this information in connection with examinations and investigations.

8. Political Contributions

Rule 15Fh–6 will deter SBS Dealers from participating, even indirectly, in pay to play practices. In addition to assisting the SBS Dealer and its CCO in supervising and assessing internal compliance with the pay to play prohibitions, the Commission staff may also review this information in connection with examinations and investigations.

9. Chief Compliance Officer

The information collected under Rule 15Fk–1 will assist the CCO in overseeing and administering an SBS Entity's compliance with the provisions of the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity. The Commission staff may also review this information in connection with examinations and investigations.

10. Foreign Branch Exception

Under the final rules, a registered major security-based swap participant or registered security-based swap dealer is not subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act, in certain transactions conducted through the foreign branch of their U.S.-person counterparty. For these purposes, the foreign branch of a U.S. bank must be the counterparty to the security-based swap transaction, and the transaction must be arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.[1508]

As discussed in the Cross-Border Proposing Release, the Commission acknowledges that verifying whether a security-based swap transaction falls within the definition of "transaction conducted through a foreign branch" could require significant due diligence. The definition's representation provision would mitigate the operational difficulties and costs that otherwise could arise in connection with investigating the activities of a counterparty to ensure compliance with the corresponding rules.[1509]

11. Substituted Compliance Rule

The Commission would use the information collected pursuant to Exchange Act Rule 3a71–6, as adopted, to evaluate requests for substituted compliance with respect to the business conduct requirements applicable to security-based swap entities. The requests for substituted compliance determinations are required when a person seeks a substituted compliance determination.

Consistent with Exchange Act Rule 0–13(h), the Commission will publish in the **Federal Register** a notice that a complete application has been submitted, and provide the public the opportunity to submit to the Commission any information that relates to the Commission action requested in the application.

C. Respondents

In the Proposing Release, the Commission stated its belief that approximately fifty entities may fit within the definition of SBS Dealer and that up to five entities may fit within the definition of Major SBS Participant.[1510] Further, the Commission understands swap and security-based swap markets to be integrated, and continues to estimate that approximately thirty-five firms that may register as SBS Entities will also be registered with the CFTC as Swap Entities.[1511] As a result, these entities will also be subject to the business conduct standards applicable to Swap Entities, which the CFTC adopted in 2012. In addition, the Commission continues to estimate that approximately sixteen registered broker-dealers will also register as SBS Dealers.[1512] In the Proposing Release, the Commission estimated that fewer than eight firms not otherwise registered with the CFTC or the Commission would register as SBS Entities. Based on an analysis of updated DTCC data, the Commission now estimates that four registrants would not otherwise be registered with the CFTC or the Commission.[1513]

In the Proposing Release, the Commission estimated that there were approximately 8,500 market participants, including approximately 1,200 special entities in the security-based swap markets.[1514] Based on an analysis of more recent DTCC data and our understanding of security-based swap markets, we currently believe that there are approximately 10,900 market participants in the security-based swap market, of which 1,141 are special entities.[1515] Of the 10,900 market participants, we estimate approximately 68% of them (7,412) are also swap market participants.[1516] Based upon the number of registered municipal advisors, we estimate that there are approximately 385 third-party independent representatives for special entities.[1517] In the Proposing Release, we estimated that approximately 95% of special entities would use a third-party independent representative.[1518] Based on additional data from DTCC through 2014, the Commission currently estimates that approximately 98% of special entities would use a third-party independent representative in their security-based swap transactions.[1519] For purposes of calculating reporting burdens, in the Proposing Release, we estimated that 60 special entities (the remaining 5% of special entities), had employees who could serve as an in-house independent representative.[1520] The Commission currently estimates that the remaining 2% of special entities, or 25 special entities, have employees who currently negotiate on behalf of and advise the special entity regarding security-based swap transactions, and who could likely fulfill the qualifications and obligations of the independent representative.[1521] Consequently, the Commission estimates a total of 410 potential independent representatives.[1522] We received no comments on any of the foregoing estimates or our basis for the estimates.

[1508] *See* Exchange Act rule 3a71–3(a)(3)(i).

[1509] *See* Cross-Border Proposing Release, 78 FR at 31107, *supra* note 6.

[1510] Proposing Release, 76 FR at 42442, *supra* note 3. *See also* Registration Adopting Release, 80 FR at 48990, *supra* note 965.

[1511] Proposing Release, 76 FR at 42442, *supra* note 3. *See also* Registration Adopting Release, 80 FR at 48990, *supra* note 989.

[1512] Proposing Release, 76 FR at 42442, *supra* note 3. *See also* Registration Adopting Release, 80 FR at 48990, *supra* note 1129.

[1513] *See* Registration Adopting Release, 80 FR at 48990, *supra* note 1129.

[1514] Proposing Release, 76 FR at 42442, *supra* note 3.

[1515] As discussed in the economic baseline, estimates of the number and type of market participants are based on hand classifications of TIW data for 2006–2014. Our classifications are not sufficiently granular to distinguish between ERISA special entities, and special entities defined in, but not subject to ERISA, and our estimates include both. Therefore, our estimates reflect both ERISA special entities, and entities that may choose to opt out of the special entity status under these final rules. *See* Sections VI.B and Section VI.C.4.i, *infra*.

In the Cross-Border Proposing Release, the Commission preliminarily estimated that 50 entities may include a representation that a security-based swap is a "transaction conducted through a foreign branch" in their trading relationship documentation.[1523] We estimate that, consistent with the proposal, a total of 50 entities may incur burdens under this collection of information, whether solely in connection with the business conduct requirements being adopted in this release or also in connection with the application of the *de minimis* exception.[1524]

Under the final rule related to substituted compliance, applications for substituted compliance may be filed by foreign financial authorities, or by non-U.S. SBS Entities. Based on the analysis of recent data, the Commission staff expects that there may be approximately 22 non-U.S. entities that potentially may register as SBS Dealers, out of approximately 50 total entities that may register as SBS Dealers.[1525] Potentially, all such non-U.S. SBS Dealers, or some subset thereof, may seek to rely on substituted compliance in connection with these business conduct requirements.[1526]

In practice, the Commission expects that the greater portion of any such substituted compliance requests will be submitted by foreign financial authorities, given their expertise in connection with the relevant substantive requirements, and in connection with their supervisory and enforcement oversight with regard to security-based swap dealers and their activities.

D. Total Annual Reporting and Recordkeeping Burdens

As discussed in Section I.C., above, aspects of Rules 15Fh–1 to 15Fh–6 conform, to the extent practicable, to the business conduct standards applicable to Swap Dealers or Major Swap Participants promulgated by the CFTC.[1527] Therefore, to the extent an SBS Entity already complies with the CFTC's business conduct standards, the Commission believes there will be minimal additional burden in complying with the requirements under the Commission's business conduct standards, as adopted.[1528]

Furthermore, a number of these rules are based on existing FINRA rules. Accordingly, the Commission expects that the estimated 16 SBS Entities that are also registered as broker-dealers are already complying with a number of these requirements in the context of their equities businesses.

1. Verification of Status

As discussed above, the Commission estimates that approximately 55 SBS Entities (of which we expect approximately 35 will be dually registered with the CFTC as Swap Entities) will be required to verify whether a counterparty is an ECP or special entity, as required by Rule 15Fh–3(a). These verification requirements are the same under the business conduct standards adopted by the CFTC.[1529] We understand that industry has developed protocols and questionnaires that allow the counterparty to indicate its status, whether or not it is a special entity and whether it elects to be treated as a special entity.[1530] As a result of these protocols and questionnaires, the Commission continues to believe that these dually registered SBS Entities will not incur any start-up or ongoing burdens in complying with the rules, as adopted, because they already adhere to the relevant protocols to obtain the information under the CFTC's business conduct standards. The remaining 20 SBS Entities will each incur $500 in start-up burdens to adhere to the protocols. In addition, each counterparty that does not already adhere to the protocols will incur $500 in start-up burdens to adhere to the protocols. In addition to the $500 fee to adhere to the protocol, in order to adhere to the protocol, an adherence letter must also be submitted, the form of which is provided online. Accordingly, we conservatively estimate that one hour will be needed to input the data required to generate the adherence letter.[1531] We do not anticipate any ongoing burdens with respect to this rule. We anticipate that the parties will adhere to the protocol. We also anticipate that in connection with each transaction, SBS Entities will require counterparties to provide a certificate indicating that there are no changes to the representations included in the protocol and that reliance on those representations would be reasonable.

[1516] This estimation assumes that the proportion of single name CDS market participants that also use index CDS is representative of the proportion of security-based swap market participants that are swap market participants in 2014. *See* Section VI.B.6, *infra*.

[1517] As of January 1, 2016 there were 665 municipal advisors registered with the Commission (*http://www.sec.gov/help/foia-docs-muniadvisorshtm.html*), of which 381 indicated that they expect to provide advice concerning the use of municipal derivatives or advice or recommendations concerning the selection of other municipal advisors or underwriters with respect to municipal financial products or the issuance of municipal securities. We expect that many of these municipal advisors will also act as independent representatives for other special entities. The Commission therefore estimates that approximately 385 municipal advisors will act as independent representatives to special entities with respect to security-based swaps.

[1518] Proposing Release, 76 FR at 42442, *supra* note 3.

[1519] The estimate is based on available market data for November 2006–December 2014 provided by DTCC that indicates approximately 98% of special entities used registered or unregistered third-party investment advisers in connection with security-based swaps transactions.

[1520] Proposing Release, 76 FR at 42442, *supra* note 3.

[1521] The estimate is based on available market data for November 2006–December 2014 provided by DTCC.

[1522] The estimate is based on the following calculation: 385 third-party independent representatives + 25 in-house independent representatives.

[1523] *See* Cross-Border Proposing Release, 78 FR at 31108, *supra* note 6.

[1524] *See id. See also* Cross-Border Adopting Release, 79 FR at 47366, *supra* note 193.

[1525] *See* U.S. Activity Adopting Release, 81 FR at 8605, *supra* note 17.

[1526] Consistent with prior estimates, the Commission staff further believes that there may be zero to five major security-based swap participants. *See* Cross-Border Proposing Release, 78 FR at 31103, *supra* note 6. It is possible that some subset of those entities will be non-U.S. major security-based swap participants that will seek to rely on substituted compliance in connection with the business conduct requirements.

[1527] *See* CFTC Adopting Release, *supra* note 21.

[1528] Notably, the CFTC adopted its final rules in 2012. Current estimates reflect the fact that the CFTC rules have been in place since that time, and that registrants will not incur a de novo burden in complying with the Commission's rules, which largely conform to those of the CFTC. In addition, as noted in the Proposing Release, some banks will register as SBS Dealers. Banking agencies, such as the Office of the Comptroller of the Currency, have issued guidance to national banks that engage in financial derivatives transactions regarding business conduct procedures, and, accordingly, the banks that may register as SBS Entities are also likely already complying with similar requirements. *See e.g.*, Risk Management of Financial Derivatives, Office of Comptroller of the Currency Banking Circular No. 277 (Oct. 27, 1993).

[1529] *See* CFTC Adopting Release, 75 FR at 80658, *supra* note 21. Accordingly, the SBS Entities that would also be registered as a Swap Dealer or Major Swap Participant with the CFTC would have verification procedures for engaging in swaps.

[1530] *See ISDA August 2012 DF Protocol* at *http://www2.isda.org/functional-areas/protocol-management/protocol/8* ("ISDA August 2012 DF Protocol").

As noted above, the Commission believes that approximately 7,412 of the 10,900 security-based swap market participants (which include SBS Entities and counterparties) are also swap market participants and likely already adhere to the relevant protocol.[1532] These 7,412 market participants would not have any start-up burdens or ongoing burdens with respect to verification. The remaining 3,488 market participants would incur $500 each to adhere to the protocol for an aggregate total of $1,744,000 and one hour for the adherence letter for an aggregate total of 3,488 hours.[1533]

2. Disclosures by SBS Entities

Pursuant to Rule 15Fh–3(b), (c), and (d), SBS Entities would be required to provide certain disclosures to market participants. Based on the Commission's experience with burden estimates for similar disclosure requirements,[1534] as well as our discussions with market participants,[1535] we understand that the SBS Entities that are dually registered with the CFTC already provide their counterparties with disclosures similar to those required under Rules 15Fh–3(b) and (c). To the extent that the material characteristics required by Rule 15Fh–3(b)(1) are included in the documentation of a security-based swap, such as the master agreement, credit support annex, trade confirmation or other documents, the Commission does not believe that any additional burden will be required for the disclosure of material characteristics. For other required disclosures relating to material risks required by Rule 15Fh–3(b)(1) or disclosures relating to material incentives or conflicts of interest required by Rule 15Fh–3(b)(2), the Commission understands that certain market participants have developed standardized disclosures for some of these requirements.[1536] For example, many SBS Dealers already provide a statement of potential risks related to investing in certain security-based swaps to their counterparties. However, to the extent that an SBS Entity and counterparty engage in a highly bespoke transaction, the standardized disclosure may not satisfy all of the SBS Entities disclosure requirements. In those cases, the SBS Entity will likely use a combination of standardized disclosures and de novo disclosures to fulfill its obligations under Rules 15Fh–3(b)(1) and (2).

In some cases, such as disclosures about the daily mark for a cleared security-based swap, the SBS Entity is obligated to provide the daily mark upon request. We understand that in the current model of clearing security-based swaps, the security-based swap between the SBS Entity and counterparty is terminated upon novation by the clearing agency. The SBS Entity would no longer have any obligation to provide a daily mark to the original counterparty because a security-based swap no longer exists between them. Therefore, there would not be any ongoing burden on the SBS Entity. Depending on how quickly the security-based swap is cleared, there may not be an initial burden on the SBS Entity either. Unlike the CFTC's rule, Rule 15Fh–3(c)(1) does not require a pre-trade daily mark. So if the security-based swap is cleared before the end of the next day and the clearing results in novation of the original swap, the SBS Entity would not have any daily mark obligations for the cleared swap.

For uncleared security-based swaps, the Commission believes that SBS Entities may need to slightly modify the models used for calculating variation margin to calculate the daily mark. In addition, the SBS Entity will need to provide the counterparty with a description of the methodologies and assumptions used to calculate the daily mark.

Nevertheless, existing accounting standards and other disclosure requirements under the Exchange Act, such as FASB Accounting Standards Codification Topic 820, Fair Value Measurements and Disclosures, or Item 305 of Regulation S–K, require disclosures similar to the description of the methodologies and assumptions of the daily mark. To the extent that the model it uses and methodologies and assumptions are not already prepared, the SBS Entity may need to prepare the initial description of the data sources, methodologies and assumptions. In addition, the SBS Entity will have an ongoing burden of updating the disclosure for any material changes to the data sources, methodologies and assumptions.

The Commission continues to believe that SBS Entities will use internal staff to revise existing disclosures to comply with Rules 15Fh–3(b) and (c), and to assist in preparing language to comply with Rule 15Fh–3(d) regarding the clearing options available for a particular security-based swap. In addition, the requirements of Rule 15Fh–3(d) are not the same as the CFTC requirements to disclose clearing choices, so SBS Entities will need to develop new disclosures.

The Commission estimates that in 2014 there has been approximately 740,700 security-based swap transactions between an SBS Dealer and a counterparty that is not an SBS Dealer. Of these, the Commission estimates that approximately 428,000 were new or amended trades requiring these disclosures.[1537] In view of the factors discussed in the Economic Analysis section and elsewhere in this release, the Commission recognizes that the time required to develop an infrastructure to provide these disclosures will vary significantly depending on, among other factors, the complexity and nature of the SBS Entity's security-based swap business, its market risk management activities, its existing disclosure practices, whether the security-based swap is cleared or uncleared and other applicable regulatory requirements. Under the rule, as adopted, SBS Entities could make the required disclosures to their counterparties through standardized documentation, such as a master agreement or other written agreement, if the parties so agree. The Commission recognizes that it will likely be necessary to prepare some disclosures that are particular to a transaction to meet all of an SBS Entity's disclosure obligations under Rules 15Fh–3(b), (c) and (d). The Commission also believes that, because the reporting burden will generally require refining or revising an SBS Entity's existing disclosure processes, the disclosures will be prepared internally.

[1531] In lieu of adhering to the protocol, market participants may engage in bilateral negotiations either to obtain representations regarding the status of the counterparty or the SBS Entity may conduct due diligence to determine the status of the counterparty. However, given the relatively low cost and time burden to adhere to the protocol, we estimate that market participants will choose to adhere to the protocol rather than pay counsel to negotiate representations or conduct the necessary due diligence in the absence of any indications that reliance on such representations would not be reasonable. For the purposes of this estimate, we have assumed that reliance on the representations in the protocol would be reasonable.

[1532] *See supra* Section V.C. regarding the estimate for the number of market participants.

[1533] Although we understand that ISDA offers bulk pricing for multiple entities that are part of the same corporate group or for fund families, we do not have the data as to how many of the 3,488 market participants are related entities that would be able to take advantage of this bulk pricing. As a result, we have conservatively estimated that each of the 3,488 market participants would incur the $500 fee and the hour for the adherence letter.

[1534] For disclosures similar to the disclosure of methodologies and assumptions of daily mark, *see* Disclosure of Accounting Policies for Derivative Financial Instruments and Derivative Commodity Instruments and Disclosure of Quantitative and Qualitative Information about Market Risk Inherent in Derivative Financial Instruments, Other Financial Instruments and Derivative Commodity Instruments, Securities Act Release No. 7386 (Jan. 31, 1997), 62 FR 6044 (Feb. 10, 1997).

[1535] *See* Proposing Release n. 14, 76 FR at 42398, *supra* note 3. *See also, supra* note 19 regarding a list of Commission staff meetings with interested parties.

[1536] *See e.g.*, ISDA General Disclosure Statement for Transactions (August 2015). To the extent that disclosures of material risks and characteristics under Rule 15Fh–3(b)(1) or disclosures of material incentives and conflicts of interest under Rule 15Fh–3(b)(2) are initially provided orally, the additional burden of providing a written version of the disclosure at or before delivery of the trade confirmation pursuant to Rule 15Fh–3(b)(3) will be considered in connection with the overall reporting and recordkeeping burdens of the SBS Entity. *See* Recordkeeping Release, *supra* note 242.

Given the foregoing, the Commission continues to conservatively estimate that on average, SBS Entities will initially require three persons from trading and structuring, three persons from legal, two persons from operations, and four persons from compliance, for 100 hours each, to comply with the rules.[1538] This team will analyze the changes necessary to comply with the new disclosure requirements, including the redesign of current compliance systems, if necessary, as well as the creation of functional requirements and system specifications for any systems development work that may be needed to automate the disclosure process.[1539] This will amount to an aggregate initial burden of 66,000 hours.[1540]

Following the initial analysis and development of specifications, the Commission continues to estimate that half of these persons will still be required to spend 20 hours annually to re-evaluate and modify the disclosures and system requirements as necessary, amounting to an ongoing annual burden of 6,600 hours.[1541] In addition, the Commission estimates that on average, the SBS Entities will require one burden hour per security-based swap to evaluate whether more particularized disclosures are necessary for the transaction and to develop the additional disclosures for an aggregate ongoing burden of 428,000 hours.[1542]

The Commission also continues to estimate that, to create and maintain an information technology infrastructure to the specifications identified by the team of persons from trading and structuring, legal, operations and compliance described above, each SBS Entity will require, on average, eight full-time persons for six months of systems development, programming and testing, amounting to a total initial burden of 440,000 hours.[1543] The Commission continues to estimate that maintenance of this system will require two full-time persons for a total ongoing burden of 220,000 hours annually.[1544]

3. Know Your Counterparty and Recommendations

As noted in the Proposing Release, the estimates in this paragraph reflect the Commission's experience with and burden estimates for similar collections of information, as well as our discussions with market participants.[1545] The Commission continues to believe that most SBS Dealers already have policies and procedures in place for knowing their counterparties, to comply with existing CFTC and FINRA standards. The Commission estimates that, on average, the rules will require each SBS Dealer to initially spend approximately five hours to review existing policies and procedures and to document the collection of information necessary to comply with its "know your counterparty" obligations—for a total initial burden of 250 hours. The Commission also continues to estimate that an SBS Dealer will spend an average of approximately 30 additional minutes each year per unique non-SBS Dealer counterparty to assess whether the SBS Dealer is in compliance with the rules' know your counterparty requirements—a total ongoing burden of approximately 11,500 hours annually,[1546] or an average of 230 hours annually per SBS Dealer.[1547]

In addition, the Commission estimates that the counterparties will require approximately ten hours for each counterparty or its agent to collect and provide essential facts to the SBS Dealer for a total initial burden of 109,000 hours.[1548]

The Commission expects that, given the institutional nature of the participants involved in security-based swaps, most SBS Dealers will obtain the representations in Rules 15Fh–3(f)(2) and (3) to comply with Rule 15Fh–3(f).[1549] For the 1,141 special entities, we expect SBS Entities will not act as an advisor pursuant to Rule 15Fh–2(a) and accordingly, the burden estimates for the SBS Entities and special entities are included in the context of the discussion for that rule, *infra*. For the 7,412 security-based swap market participants that are also swap market participants, including the thirty-five firms that we expect to be dually registered as Swap Dealers and SBS Dealers, most of the requisite representations have been drafted for the swaps context.[1550] We understand that swap market participants are currently utilizing standardized representations that are currently in Schedule 3 of the ISDA August 2012 DF Protocol. The $50 million institutional suitability threshold is consistent with the institutional suitability exception in FINRA standards, but may require SBS Dealers to obtain an additional representation or conduct due diligence to determine the counterparty has total assets of at least $50 million. To the extent that any modifications are necessary to adapt those representations to the security-based swap context, we conservatively estimate that market participants will each require two hours to assess the necessity and make any necessary modifications for the security-based swap context for an aggregate initial burden of 12,542 hours for the market participants that participate in both the security-based swaps market and the swaps market.[1551] We do not anticipate any ongoing burden with respect to the requisite representations because the representations in the swaps context are deemed repeated "as of the occurrence of each Swap Communication Event" and we would anticipate a similar construction in the security-based swap context. For the remaining 3,488 market participants, we expect that they will draft the requisite representations to comply with the institutional suitability analysis in Rule 15Fh–3(f)(2). We also anticipate that these 3,488 market participants are likely to model their representations on the representations included in the ISDA August 2012 DF Protocol because the SBS Entity is already familiar with those particular representations. Accordingly, we estimate that the remaining 3,488 market participants will each require five hours to review and agree to representations similar to those included in such protocol for an aggregate initial burden of 17,440 hours.[1552] Again, we do not anticipate an ongoing burden for these representations for the reasons set forth above.

[1537] Available DTCC–TIW data for 2014 indicated approximately 740,700 transactions between SBS Entities and non-SBS Entities during that time period. Of these, approximately 240,000 were new trades, and 188,000 were amendments. Of the approximately 240,000 new trades between likely SBS Dealers and non-dealers, only 1,000 trades or approximately 0.5% were voluntarily cleared bilateral trades in 2014.

[1538] In the Proposing Release, the Commission used this estimate and it recognizes the development of market practice to comply with very similar CFTC rules. It also recognizes that given the current model used for clearing security-based swaps, daily mark disclosures in that context are unlikely to be required. Furthermore, no comments were received on these estimates. As a result, the Commission conservatively continues to use these estimates.

[1539] Some SBS Entities may choose to utilize in-house counsel to review, revise and prepare these disclosures.

[1540] The estimate is based on the following calculation: (55 SBS Entities) × (12 persons) × (100 hours).

[1541] The estimate is based on the following calculation: (55 SBS Entities) × (6 persons) × (20 hours).

[1542] The estimate is based on the following calculation: (428,000 security-based swaps that require these disclosures) × (1 hour). The Commission realizes that some assessments may take less time and some may take more. In addition, to the extent that additional disclosures are required, drafting the disclosure is likely to take more than an hour, but we expect the vast majority of transactions will not require additional disclosures so that an average of one hour per transaction is a reasonable estimate.

[1543] The estimate is based on the following calculation: (55 SBS Entities) × (4 persons) × (2000 hours).

[1544] The estimate is based on the following calculation: (55 SBS Entities) × (2 persons) × (2000 hours).

[1545] *See* Proposing Release n. 14, 76 FR at 42398, *supra* note 3. *See* also *supra* note 19 regarding a list of Commission staff meetings with interested parties.

[1546] The estimate is based on the following calculation: (23,000 unique SBS Dealer—non-dealer counterparty pairs) × 30 minutes / 60 minutes. In the Proposing Release, the Commission estimated 47,000 unique SBS Dealer—non-dealer counterparty pairs. Based on updated DTCC–TIW data, we now estimate 23,000 SBS Dealer—non-dealer counterparty pairs.

[1547] To the extent that the SBS Dealer is unfamiliar with the counterparty, the Commission would expect a greater time burden and as an SBS Dealer becomes more familiar with the particular counterparty, the Commission would expect a lesser time burden. As a result, we use 30 minutes as an average estimate.

[1548] The estimate is based on 10,900 market participants × 10 hours.

[1549] The Commission bases its expectation on its observation and experience in the context of transactions by broker-dealers with institutional clients and the use of FINRA's institutional suitability exception in that context.

4. Fair and Balanced Communications

Rule 15Fh–3(g) requires SBS Entities to communicate with counterparties "in a fair and balanced manner, based on principles of fair dealing and good faith." The three specific standards of Rule 15Fh–3(g) require that: (1) Communications must provide a sound basis for evaluating the facts with respect to any security-based swap or trading strategy involving a security-based swap; (2) communications may not imply that past performance will recur, or make any exaggerated or unwarranted claim, opinion, or forecast; and (3) any statement referring to the potential opportunities or advantages presented by a security-based swap or trading strategy involving a security-based swap shall be balanced by an equally detailed statement of the corresponding risks.[1553] We expect that a discussion of material risks of the transaction will be included in the documentation for the security-based swap. The Commission believes that all 55 SBS Entities will be required to comply with Rule 15Fh–3(g), and that they will likely send their existing marketing materials to outside counsel for review and comment. Accordingly, the Commission continues to believe that each SBS Entity will likely incur $6,000 in legal costs, or $330,000 in the aggregate initial burden, to draft or review statements of potential opportunities and corresponding risks in the marketing materials for single name and narrow based index credit default swaps, total return swaps and other security-based swaps.[1554]

The Commission additionally believes that compliance with Rule 15Fh-3(g) would require a review of SBS Entities' other communications to their counterparties, such as emails and Bloomberg messages. However, we believe that such additional communications would likely be reviewed internally, by in-house legal counsel or an SBS Entity's CCO. We estimate that the initial internal burden hours associated with this review would be approximately six hours, for an aggregate total of 330 hours.[1555]

For more bespoke transactions, the cost for outside counsel to review the marketing materials will depend on the complexity, novelty and nature of the product, but the Commission expects a higher cost associated with the review for more novel products. The Commission accordingly estimates an initial, aggregate compliance cost for the marketing materials relating to bespoke single name and narrow based index credit default swaps, total return swaps and other security-based swaps at $462,000.[1556]

As stated above in Section II.G.5, Rule 15Fh–3(g) applies to communications made before the parties enter into a security-based swap, and continues to apply over the term of a security-based swap. The Commission believes that the ongoing compliance costs associated with the rule will likely be limited to a review of SBS Entities' email communications sent to counterparties, which we believe will likely be done by in-house counsel. We estimate that the ongoing compliance costs of the rule will be approximately two burden hours, for an aggregate total of 330 hours.[1557]

5. Supervision

As outlined above, Rule 15Fh–3(h) requires an SBS Entity to establish and maintain a system to supervise, and to diligently supervise, its business and the activities of its associated persons. Such a system shall be reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder relating to its business as an SBS Entity. The written policies and procedures required by Rule 15Fh–3(h) must include, at a minimum, procedures for nine specific areas of supervision.

[1550] Of the 7,412 market participants that engage in both swaps and security-based swaps, a proportion of them will also be special entities. This calculation assumes all of the special entities are engaged in transactions in both markets, leaving 6,271 market participants (7,412 market participants − 1,141 special entities) to adapt the representations in the ISDA August 2012 DF Protocol to the security-based swap context, as necessary.

[1551] This calculation is based on the assumption that all of the special entities are engaged in both the swaps market and the security-based swaps market and that the special entities will choose to comply with the safe harbor of Rule 15Fh–5(b). (7,412 market participants − 1,141 special entities) × (2 hours).

[1552] This estimate is based on the following calculation: (3,488 market participants) × (5 hours).

[1553] To the extent that the 16 registered broker-dealers that are expected to register as SBS Entities are also FINRA members, they are already subject to these similar FINRA requirements in the non-security based swap context. *Cf.* FINRA Rule 2210(d)(1)(D) ("Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.") The Commission believes that this requirement addresses concerns raised by a commenter that to be fair and balanced, communications must inform investors of both the potential rewards and risks of their investments. *See* Levin, *supra* note 5.

[1554] The Commission estimates that the review of marketing materials for these three categories of security-based swaps would require 5 hours of outside counsel time, at an average cost of $400 per hour. This estimate also assumes that each SBS Entity engages in all three categories of security-based swaps.

[1555] The Commission estimates that the review of additional communications for these three categories of security-based swaps would require internal burden hours for each of the 55 SBS Entities. This estimate also assumes that each SBS Entity engages in all three categories of security-based swaps.

[1556] The Commission estimates the review of the marketing materials for each of these categories would require seven hours of outside counsel time at a cost of $400 per hour. This estimate also assumes that each SBS Entity engages in all three categories of transactions.

[1557] The Commission estimates that the review of additional communications for these three categories of security-based swaps would require two internal burden hours for each of the 55 SBS Entities. This estimate also assumes that each SBS Entity engages in all three categories of security-based swaps.

As for the number of SBS Entities respondents, the Commission continues to estimate that approximately 55 SBS Entities (of which we expect approximately 35 will be dually registered with the CFTC as Swap Entities) will be required to comply with analogous supervision rules like those required by Rule 15Fh–3(h).[1558] The supervision requirements in Rule 15Fh–3(h) are largely the same under the business conduct standards and related rules adopted by the CFTC.[1559]

The estimates in this paragraph reflect the foregoing information, as well as the Commission's general experience with and understanding of the burden estimates in similar contexts, including, but not limited to, FINRA's analogous supervision rules. While each of the nine written policies and procedures required, at a minimum, by Rule 15Fh–3(h) will vary in cost, the Commission continues to estimate that such policies and procedures will require, on average, 210 hours per respondent, per policy and procedure to initially prepare written policies and procedures in order to establish a system to diligently supervise those policies and procedures, or an average of 1,890 burden hours per SBS Entity—resulting in an initial aggregate burden of 103,950 hours.[1560] The Commission also continues to expect that many SBS Entities will primarily rely on outside counsel for the collection of information required under this rule at a rate of $400 per hour, for an average of 450 hours per respondent, with a minimum of nine policies and procedures, resulting in an outside initial cost burden of $180,000 per respondent—or an aggregate initial cost of $9,900,000.[1561] Once these policies and procedures are established, the Commission continues to estimate that, on average, each SBS Entity will spend approximately 540 hours (approximately 60 hours per policy and procedure) each year to maintain these policies and procedures, yielding a total ongoing annual burden of approximately 29,700 internal burden hours (55 SBS Entities × 540 hours).[1562] The Commission believes that the maintenance of these policies and procedures will be conducted internally.

6. SBS Dealers Acting as Advisors to Special Entities

As discussed above, Rule 15Fh–4 imposes on SBS Dealers that act as advisors to special entities a duty to make a reasonable determination that any security-based swap or related trading strategy that the SBS Dealer recommends is in the "best interests" of the special entity. Rule 15Fh–2(a) states that an SBS Dealer "acts as an advisor" to a special entity when it recommends a security-based swap or related trading strategy to the special entity. However, the rule provides a safe harbor whereby an SBS Entity will not be deemed an "advisor" if an ERISA special entity counterparty relies on advice from an ERISA fiduciary, or where any special entity counterparty relies on advice from a qualified independent representative that acts in its best interests.[1563]

In the Proposing Release, the Commission recognized the inherent tensions that arise where SBS Dealers recommend a security-based swap or related transaction to special entity counterparties.[1564] Given the parties' incentive to transact in security-based swaps, the Commission believes that the parties are likely to resolve these tensions by providing the necessary representations and disclosures to meet the requirements of the safe harbor under Rule 15Fh–2(a)(1)–(2), such that an SBS Dealer will not be deemed to act as an advisor to a special entity, particularly for transactions in which the SBS Dealer is the counterparty to the transaction.

Among swap dealers operating under the CFTC's parallel safe harbor,[1565] parties have generally included representations in standard swap documentation that both counterparties are acting as principals, and that the counterparty is not relying on any communication from the swap dealer as investment advice. We believe that SBS Dealers and their special entity counterparties will similarly include the requisite representations in standard security-based swap documentation. These representations will need to be reviewed and revised to ensure that they comply with the rules the Commission adopts today.

As stated in the Proposing Release, the Commission continues to believe that the 50 SBS Dealers will primarily rely on in-house counsel for compliance with this rule, each of which will need approximately five internal burden hours to draft, review and revise the representations in its standard security-based swap documentation to comply with Rule 15Fh–2(a)(1)–(2), for an initial aggregate burden of 250 hours.[1566] The Commission also believes that, once an SBS Dealer revises the language of the representations to meet the requirements of Rule 15Fh–2(a)(1)–(2), such language will become part of the SBS Dealer's standard security-based swap documentation and, accordingly, there will be no further ongoing burden associated with this rule. For transactions in which an SBS Dealer is not a counterparty and chooses to act as an advisor, the Commission estimates that an SBS Entity will require approximately 20 internal burden hours to collect the requisite information from each special entity, for an aggregate initial burden of approximately 1,700 hours.[1567]

7. SBS Entities Acting as Counterparties to Special Entities

Where a special entity is a counterparty to a security-based swap, Rule 15Fh–5(a)(1) requires an SBS Entity to have a reasonable basis for believing that the special entity has a qualified independent representative that meets specified requirements. Where the special entity counterparty is an ERISA plan, under Rule 15Fh–5(a)(2), the SBS Entity must have a reasonable basis to believe that the ERISA plan is represented by an ERISA fiduciary. The Commission believes that written representations will likely provide the basis for establishing an SBS Entity's reasonable belief regarding the qualifications of the independent representative.

[1558] Proposing Release, 76 FR at 42442, *supra* note 3. *See also* Registration Adopting Release, 80 FR at 48990, *supra* note 1129.

[1559] *See* Commodity Exchange Act Rule 23.602. *See also* Commodity Exchange Act Rule 23.402(a) (policies and procedures to ensure compliance); Commodity Exchange Act Rule 3.3(d)(1) (administration of compliance policies and procedures). Accordingly, the SBS Entities that would also be registered as a swap dealer or major swap participant with the CFTC would have supervision policies and procedures for engaging in swaps.

[1560] *See* Proposing Release, 76 FR at 42446, *supra* note 3. The estimate is based on the following calculation: (210 hours) × (9 policies and procedures) × (55 SBS Entities). The estimates reflected do not include the burden and cost of actually complying with the underlying substance of these written policies and procedures as that is beyond the scope of the PRA analysis.

[1561] Some SBS Entities may choose to utilize in-house counsel to initially prepare these policy and procedure, which would mitigate the aggregate initial cost, but the Commission's estimate of $9,900,000 reflects a conservative assumption of SBS Entities primarily relying on outside counsel to prepare these materials.

[1562] *See* Proposing Release, 76 FR at 42446, *supra* note 3.

[1563] Rule 15Fh–2(a)(1)–(2).

[1564] *See* Proposing Release, 76 FR at 42424, *supra* note 3.

[1565] *See* CFTC Regulation § 23.440(b)(1)–(2).

[1566] *See* Proposing Release, 76 FR at 42446, *supra* note 3. This estimate is based on multiplying the number of SBS Dealers (50) by the number of estimated internal burden hours (5).

[1567] This estimate is based on available market data for November 2006–September 2014 provided by DTCC that indicates 85 unique pairs of SBS Dealers and U.S. special entities without a third-party investment adviser. Based on 2014 single name CDS data in DTCC–TIW, there were 2 unique trading relationships between likely SBS Dealers and special entities without a third party investment adviser, which entered into 272 new trades and 200 terminations, representing 0.039% of all transactions in 2014.

As stated in the Proposing Release, the Commission continues to believe that the burden for determining whether an independent representative is independent of the SBS Entity will depend on the size of the independent representative, the size of the SBS Entity, and the volume of transactions with which each is engaged. The Commission further believes that each SBS Entity would initially require written representations regarding the qualifications of a special entity's independent representative, but would only require updates to the independent representative's qualifications in subsequent dealings with the same independent representative throughout the duration of the swap term, provided the volume and nature of the security-based swap transaction remain the same.

Regarding the initial burden estimates for SBS Entities, the Commission's updated estimates reflect that each SBS Entity will interact with and be required to form a reasonable basis regarding the qualifications of approximately 385 independent, third-party representatives and 25 in-house independent representatives, for a total of 410 independent representatives. In the Proposing Release, the Commission estimated an average internal burden of 15 hours for each SBS Entity per independent representative. We have increased this estimate based on changes to the representations that SBS Entities will have to obtain and now estimate that each SBS Entity, on average, will initially require approximately 15.5 internal burden hours from the SBS Entity's own in-house counsel per independent representative to collect the information necessary to comply with this requirement. This will result in an aggregate initial burden of 349,525 internal hours (15.5 hours × 410 independent representatives × 55 SBS Entities).[1568] We do not believe there will be any external burdens associated with this rule.

With regard to SBS Entities' ongoing burden, the Commission believes that such burden would be minimal, since, once an SBS Entity forms a reasonable basis to believe that a given independent representative meets the qualifications of Rule 15Fh–5, the SBS Entity will not likely need to reaffirm that independent representative's qualifications anew, but could instead rely on past representations regarding the representative's qualifications. We estimate that SBS Entities will incur an ongoing, aggregate burden of 22,500 hours (1 hour × 55 SBS Entities × 410 independent representatives) per year as a result of this rule.

In addition to the burdens imposed on SBS Entities, Rule 15Fh–5(a)(1) will also impose a burden on special entities' independent representatives to collect the necessary information regarding their relevant qualifications, and provide that information to the SBS Entity and/or the special entity. The Commission continues to believe that the reporting burden for the independent representative will consist of providing written representations to the SBS Entity and/or the special entity it represents. The Commission believes that the burden associated with an independent representative's obligation to assess its independence from the SBS Entity will likely depend on the size of the independent representative, the size of the SBS Entity, the interactions between the independent representative and the SBS Entity, the policies and procedures of the independent representative and depend less on the number of transactions in which the independent representative is engaged. The policies and procedures of the independent representative will facilitate its ability to quickly assess, disclose, manage and mitigate any potential material conflicts of interest. We now believe the number of transactions in which the independent representative engages is less likely to impact this assessment. Accordingly, we have updated our estimates.

We anticipate that independent representatives will rely on in-house counsel to collect and submit the relevant documentation and information regarding its qualifications. The Commission also estimates that each independent representative, on average, will initially require approximately 16 internal burden hours from its in-house counsel per SBS Entity to collect the information necessary to comply with this requirement.[1569] This will result in an aggregate initial burden of 360,800 internal hours (16 hours × 410 independent representatives × 55 SBS Entities).

As with SBS Entities' ongoing burden associated with this rule, the Commission believes that the ongoing burden imposed on independent representatives would be minimal, since, once the independent representative has provided information regarding its qualifications to the SBS Entity, the independent representative will not likely need to collect or provide that information again, but could instead rely on a bring down certificate that reflects past representations regarding its qualifications. We estimate that independent representatives will incur an ongoing, aggregate burden of 22,500 hours (1 hour × 55 SBS Entities × 410 independent representatives) per year as a result of this rule.[1570] We do not believe there will be external burdens associated with this rule.

8. Political Contributions

As noted above, the Commission believes that there will be approximately 50 SBS Dealers subject to these rules, and estimates that all of them will provide, or will seek to provide, security-based swap services to municipal entities. SBS Dealers, in order to supervise and assess internal compliance with the pay to play rules, will need to collect information regarding the political contributions of SBS Dealers and their covered associates. In addition, SBS Dealers' covered associates will also need to collect and provide the information required by these rules to SBS Dealers.

The Commission's estimates in this paragraph take into account the burden of the covered associates and the SBS Dealers. These estimates also reflect the

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[1568] While the Commission does not believe that every SBS Entity is likely to deal with every independent representative, we do not have data on the average number of independent representatives with whom each SBS Entity would deal. Accordingly, for the purposes of these calculations, we have assumed that each SBS Entity will deal with each independent representative.

[1569] While the Commission does not believe that every independent representative is likely to deal with every SBS Entity, we do not have data on the average number of SBS Entities with whom each independent representative would deal. Accordingly, for the purposes of these calculations, we have assumed that each SBS Entity will deal with each independent representative.

[1570] We note that, in the Proposing Release, we based our burden estimates for evaluating an independent representative's qualifications on the underlying assumption that representations regarding an independent representative's qualifications must be provided prior to every transaction, and therefore the associated burden calculations were transaction-specific. *See* Proposing Release, 76 FR 42446–7, *supra* note 3. However, based on the observed practices of swap market participants, we now believe that representations regarding an independent representative's qualifications need only be provided in the context of each relationship with an SBS Entity. Our revised calculations, which are now relationship-specific, reflect this shift in our underlying assumption.

Commission's experience with and burden estimates for similar requirements, as well as our discussions with market participants.[1571] Based on the foregoing, the Commission estimates that it will take, on average, approximately 185 hours per SBS Dealer—resulting in a total initial burden of 9,250 hours[1572] to collect the information regarding the political contributions of SBS Dealers and their covered associates to assist SBS Dealer in their compliance with the rule. The Commission believes that many SBS Dealers will primarily rely on in-house counsel for the collection of information required under this rule.

Additionally, we expect some SBS Dealers to incur one-time costs to establish or enhance current systems to assist in their compliance with the rule. These costs will vary widely among firms. Similar to the estimates made by the Commission in connection with the Advisers Act pay to play rule, we have also estimated that some small and medium firms will incur start-up costs, on average, of $10,000, and larger firms will incur, on average, $100,000. Assuming all SBS Dealers will be larger firms, the initial cost to establish or enhance current systems to assist in their compliance with the rule is estimated at $5,000,000 for all SBS Dealers.[1573] Nevertheless, we note that some SBS Dealers may not incur any system costs if they determine a system is unnecessary due to their limited number of employees, or their limited number of municipal entity counterparties. Furthermore, like other large firms, SBS Dealers have likely devoted significant resources to automating compliance and reporting with respect to regulations concerning certain political contributions. This rule could, therefore, cause them to enhance the existing systems that had originally been designed to comply with MSRB Rules G–37 and G–38 and Advisers Act Rule 206(4)–5.

The final rules also allow SBS Dealers to file applications for exemptive relief, and outline a list of items to be addressed, including, whether the SBS Dealer has developed policies and procedures to monitor political contributions; the steps taken after discovery of the contribution; and the apparent intent in making the contribution based on the facts and circumstances of each case. The incidence of exemptive relief related to MSRB Rule G–37 and the number of applications the Commission has received under the Advisers Act Rule 206(4)–5 may be indicative of the possible applications for exemptive relief under these final rules. Consistent with the Commission's estimates in connection with Advisers Act Rule 206(4)–5, we also estimate that a firm that applies for an exemption will hire outside counsel to prepare an exemptive request, and estimate that the number of hours counsel will spend preparing and submitting an application between 16 hours to 32 hours, at a rate of $400 per hour. Recognizing that this is an estimate, we conservatively estimate that the Commission may receive up to two applications for exemptive relief per year with respect to pay to play rules.[1574] at a total ongoing cost of $25,600 per year, assuming conservatively 32 hours for outside counsel to prepare an exemptive request.[1575]

9. Chief Compliance Officer

Under Rule 15Fk–1, an SBS Entity's CCO is responsible for, among other things, taking reasonable steps to ensure that the SBS Entity establishes and maintains policies and procedures reasonably designed to ensure compliance by the SBS Entity with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity. The Commission continues to estimate that, on average, the establishment and administration of the policies and procedures required under Rule 15Fk–1 (*e.g.*, preparing an annual compliance report and the SBS Entity's annual assessment of its written policies and procedures reasonably designed to achieve compliance with Section 15F and the rules and regulations thereunder) will require 630 hours to create and 180 hours to administer per year per respondent, for a total burden of 34,650 initial hours, and 9,900 hours per year on average, on an ongoing basis.[1576] The Commission also continues to estimate that a total of $60,000 in outside legal costs will be incurred to, among other things, assist in the preparation of the annual compliance report and the SBS Entity's annual assessment of its written policies and procedures, as a result of this burden per respondent, for a total initial outside cost burden of $3,300,000.[1577]

A CCO will also be required to prepare and submit annual compliance reports to the Commission and the SBS Entity's board of directors. In the Proposing Release, the Commission estimated that these reports would require on average 92 hours per respondent per year for an ongoing annual burden of 5,060 hours. As a result of additional descriptions that some CCOs will have to include in their annual compliance reports, we now estimate that these reports will require on average 93 hours per respondent per year for an ongoing annual burden of 5,115.[1578] Because the report will be submitted by an internal CCO, the Commission does not expect any external costs associated therewith.

10. Foreign Branch Exception

The Commission estimates the one-time paperwork burden associated with developing representations under this collection of information would be, for each U.S. bank counterparty that may make such representations to its registered Major SBS Participant or registered SBS Dealer counterparty, no more than five hours, and up to $2,000 for the services of outside professionals, for an estimate of approximately 250 hours and $100,000 across all security-based swap counterparties that may make such representations.[1579] This estimate assumes little or no reliance on standardized disclosure language.

However, as the Commission has previously noted in connection with this collection of information, in most cases, the representations associated with the definition of "transaction conducted through a foreign branch" are likely to be made through amendments to the parties' existing trading documentation (*e.g.*, the schedule to a master agreement).[1580] Because these representations relate to new regulatory requirements, the Commission anticipates that U.S. bank counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that parties would be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships.

[1571] *See* Advisers Act Pay-to-Play Release, 75 FR 41018, 41061–65, *supra* note 1100. *See also supra* note 19 regarding a list of Commission staff meetings with interested parties.

[1572] The estimate is based on the following calculation: (185 hours × 50 SBS Dealers).

[1573] The initial cost is estimated at: 50 SBS Dealers × $100,000 = $5,000,000. *See* Advisers Act Pay-to-Play Release, 75 FR at 41061, *supra* note 1100 (estimating that larger firms will incur, on average, $100,000, in start-up costs).

[1574] FINRA has granted 17 exemptive letters related to Rule G–37 between 1/05 and 12/15 (11 years) *http://www.finra.org/industry/exemptive-letters.* In addition, the Commission has received 13 applications under the Adviser's act (since the compliance date, approximately 4 years).

[1575] Ongoing: (Outside counsel at $400 per hour × 32 hours per application × 2) = $25,600. *See* Advisers Act Pay-to-Play Release, 75 FR at 41065, *supra* note 1100 (making similar estimates in connection with Advisers Act Rule 206(4)–5).

[1576] *See* Proposing Release, 76 FR at 42448, *supra* note 3.

[1577] *See id.* This figure is the result of an estimated $400 per hour cost for outside legal services times 150 hours for 3 policies and procedures for 55 respondents. *See* SDR Registration Release, *supra* note 1202.

[1578] The estimate is based on the following calculation: (93 hours) × (55 SBS Dealers).

[1579] *See* Cross-Border Proposing Release, 78 FR at 31108, *supra* note 6 (explaining that the Commission estimated that 50 entities may include a representation that security-based swap is a "transaction conducted through a foreign branch" in their trading relationship documentation).

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission continues to believe that the on-going paperwork burden associated with this requirement will be 10 hours per U.S. bank counterparty for verifying representations with existing counterparties, for a total of approximately 500 hours across all applicable U.S. bank counterparties.[1581]

11. Substituted Compliance Rule

Rule 3a71–6 under the Exchange Act would require submission of certain information to the Commission to the extent that foreign financial authorities or security-based swap dealers or major security-based swap participants elect to request a substituted compliance determination with respect to the Title VII business conduct requirements. Consistent with Exchange Act Rule 0–13, such applications must be accompanied by supporting documentation necessary for the Commission to evaluate the request, including information regarding applicable foreign requirements, and the methods used by foreign authorities to monitor and enforce compliance.

The Commission expects that registered security-based swap dealers and major security-based swap participants will seek to rely on substituted compliance upon registration, and that it is likely that the majority of such requests will be made during the first year following the effective date of this substituted compliance rule. Requests would not be necessary with regard to applicable rules and regulations of a foreign jurisdiction that have previously been the subject of a substituted compliance determination in connection with the applicable rules.

In light of the provisions of the final rule and rule 0–13, permitting substituted compliance applications to be made by foreign regulatory authorities, the Commission expects that the great majority of substituted compliance applications will be submitted by foreign authorities, and that very few substituted compliance requests will come from SBS Entities. For purposes of this assessment, the Commission estimates that three such SBS Entities will submit such applications.[1582] The Commission estimates that the total one-time paperwork burden incurred by such entities associated with preparing and submitting a request for a substituted compliance determination in connection with the business conduct requirements will be approximately 240 hours, plus $240,000 for the services of outside professionals for all three requests.[1583]

E. Collections of Information are Mandatory

With the exception of the collection of information related to the foreign branch exception, compliance with collection of information requirements under these rules is mandatory for all SBS Dealers and SBS Entities. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Compliance with the collection of information requirements associated with rule 3a71–6, regarding the availability of substituted compliance, is mandatory for all foreign financial authorities or non-U.S. SBS Entities that seek a substituted compliance determination.

F. Confidentiality

The forms that the Commission has adopted for use by applicants for registration as security-based swap dealers or major security-based swap participants provide for applicants to notify the Commission regarding intended reliance on substituted compliance.[1584] Also, the Commission generally will make requests for substituted compliance determination public, subject to requests for confidential treatment being submitted pursuant to any applicable provisions governing confidentiality under the Exchange Act.[1585]

The representations provided in connection with the foreign branch exception would be provided voluntarily by certain U.S. bank counterparties to their registered SBS Dealer counterparties; therefore, the Commission would not typically receive confidential information as a result of this collection of information. However, to the extent that the Commission receives confidential information contained in a representation document through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law.

G. Retention Period of Recordkeeping Requirements

SBS Dealers will be required to retain records and information relating to these rules for the required retention periods specified in Exchange Act Rule 17a–4.

[1580] *See* Cross-Border Adopting Release, 79 FR at 47366, *supra* note 193. *See also* Cross-Border Proposing Release, 78 FR at 31108, *supra* note 6 (noting that entities may include the representation in their trading relationship documentation). The Commission believes that because trading relationship documentation is established between two counterparties, the question of whether one of those counterparties is able to represent that it is entering into a "transaction conducted through a foreign branch" would not change on a transaction-by-transaction basis and, therefore, such representations would generally be made in the schedule to a master agreement, rather than in individual confirmations.

[1581] The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant that may make such representations. *See* Cross-Border Adopting Release, 79 FR 47367 (estimating 10 hours per counterparty for verification), *supra* note 193; Cross-Border Proposing Release, 78 FR 31108 (same), *supra* note 6.

[1582] This estimate differs from the Cross-Border Proposing Release estimate, that there would be no more than 50 requests for substituted compliance determinations pursuant to proposed Rule 3a71–5. *See* Cross-Border Proposing Release, 78 FR at 31110, *supra* note 6. The revised estimate reflects our expectation that the large majority of substituted compliance requests will be made by foreign regulatory authorities, rather than by market participants.

[1583] Consistent with the per-request estimates in the Cross-Border Proposing Release, the Commission estimates that the paperwork burden associated with making each such substituted compliance request would be approximately 80 hours of in-house counsel time, plus $80,000 for the services of outside professionals (based on 200 hours of outside time * 400). *See* Cross-Border Proposing Release, 78 FR at 31110, *supra* note 6.

In practice, those amounts may overestimate the costs of requests pursuant to Rule 3a71–6 as adopted, as such requests would solely address business conduct requirements, rather than the broader proposed scope of substituted compliance set forth in that proposal.

[1584] *See* Registration Adopting Release, 80 FR at 49049, *supra* note 989 (questions 3A, B and C of Form SBSE–A, addressing potential reliance on substituted compliance determinations)

[1585] *See* SBS Entity Definitions Adopting Release, 79 FR at 47359, *supra* note 1451 (discussing confidentiality provisions under the Exchange Act in connection with adopting Rule 0–13, governing applications for substituted compliance).

VI. Economic Analysis

A. Introduction and Broad Economic Considerations

The Commission is sensitive to the costs and benefits imposed by its rules. This section presents an analysis of the particular economic effects—including costs, benefits and impact on efficiency, competition, and capital formation—that may result from our final rules. Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and to not adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. In the Proposing Release, the Commission solicited comments on all aspects of the costs and benefits associated with the proposed rules, including any effect the proposed business conduct rules may have on efficiency, competition, and capital formation.[1586] The Commission has considered these comments and has modified some of the rules being adopted as discussed in sections I, II and III, *supra*.

The business conduct rules as adopted implement the requirements under Sections 15F(h) and 15F(k) of the Exchange Act as added by Section 764(a) of the Dodd-Frank Act. As discussed in Section VI.C, infra, the final rules include both requirements expressly addressed by Title VII of the Dodd-Frank Act, as well as discretionary rules designed to further the principles which underlie the statutory requirements. These discretionary rules include requirements to make certain additional disclosures; certain "know your counterparty" obligations; suitability obligations for SBS Dealers; prohibitions against certain "pay to play" activities; and a requirement of board approval for decisions related to the compensation or removal of the CCO.

SBS Entities play a central role in intermediating transactions in complex and opaque security-based swaps, and enjoy significant informational advantages compared to their less sophisticated counterparties. For instance, SBS Dealers observe quote solicitations and order flow. SBS Dealers may also act as lenders, placement agents, underwriters, structurers or securitizers of the securities underlying security-based swaps. As a result of operating in such additional capacities, SBS Dealers may have superior information about the quality of security-based swaps and of securities underlying security-based swaps. Major SBS Participants may have lower volumes of dealing activity than SBS Dealers, but may hold large concentrated positions in security-based swaps,[1587] and may have specialized expertise in pricing and trading security-based swaps. At the same time, less informed and less sophisticated counterparties do not observe order flow, may have less information concerning the risks and expected returns of security-based swaps and reference securities, and may have less expertise in valuing complex security-based swaps.

In addition, SBS Dealers are for-profit entities with business incentives that may be competing with those of their counterparties. Due to the nature of their market making and intermediation roles, SBS Dealers purchase security-based swaps from counterparties seeking to sell them, and sell security-based swaps to counterparties seeking to buy them. When SBS Dealers transact as principal risk holders and do not hedge their exposures, they benefit from directional market moves that result in losses for their counterparties. When SBS Dealers hedge their exposures and do not carry balance sheet risk, they may be indifferent to directional price moves of the security-based swap, but profit from charging high fees to their counterparties, whereas their counterparties benefit from low fees and transaction costs. If SBS Dealers recommend security-based swaps to counterparties, such recommendations may be influenced by the above business incentives. Counterparties of SBS Dealers may be aware of these competing incentives, and SBS Dealers generally benefit from intermediating a greater volume of trades, potentially mitigating these effects. However, informational asymmetries between SBS Dealers and their counterparties outlined above may limit the ability of counterparties to decouple the potential biases and information components of SBS Dealer recommendations, and to evaluate the merits of each security-based swap.

Broadly, these external business conduct rules as adopted may decrease informational asymmetries between SBS Entities and their less sophisticated counterparties and strengthen counterparty protections. This may enable market participants to make better informed investment decisions, and enhance allocative efficiency in security-based swap markets.

The baseline for our economic analysis reflects rules adopted as part of the SBS Entity Definitions Adopting Release, the Cross-Border Adopting Release, Regulation SBSR and SDR Rules,[1588] as well as SBS Entity registration rules. We also recognize that final U.S. Activity rules have been adopted, and affect the scope of cross-border transactions that will become subject to various substantive Title VII requirements, including those related to business conduct standards. While these rules are not yet in effect, to perform a meaningful analysis of the business conduct requirements being adopted and their cross-border application, our baseline includes the final U.S. Activity rules.[1589]

Title VII provides a statutory framework for the OTC derivatives market and divides authority to regulate that market between the CFTC (which regulates swaps) and the Commission (which regulates security-based swaps). We note that many entities expected to register with the Commission as SBS Entities are currently intermediating large volumes of transactions across swap, security-based swap and reference security markets. The Commission has previously estimated that of the total 55 entities expected to register with the Commission as SBS Entities, up to 35 entities are registered with the CFTC as Swap Entities, and up to 16 entities are registered with the Commission as broker-dealers.[1590] Since broker-dealers registered with the Commission and Swap Entities registered with the CFTC are required to join an SRO, the majority of SBS Entities may already be subject to CFTC and SRO oversight. Therefore, we anticipate that many of the entities expected to register as SBS Entities and become subject to the Commission's final business conduct rules may have already brought their business into compliance with CFTC business conduct requirements and SRO rules, among others. The Commission has sought to harmonize, to the extent practicable, the final business conduct requirements with existing requirements applicable to SBS Dealers and broker-dealers. Obligations imposed on SBS Entities in this rulemaking are modeled on, and largely similar to, obligations applicable to Swap Entities and registered broker-dealers. These obligations include disclosure, know-your-customer, suitability, pay-to-play, supervision, and compliance responsibilities. The Commission has also considered the implications of certain business conduct rules regarding special entities subject to ERISA. DOL staff has stated that the final business conduct standards neither conflict with DOL regulations nor compel SBS Entities to engage in fiduciary conduct, as discussed in Section II.D supra.

[1586] *See* Proposing Release, *supra* note 3.

[1587] See Definitions Adopting Release, 77 FR at 30751–30756, *supra* note 115.

[1588] 17 CFR 232.11, 232.101, 232.305, and 232.407; 17 CFR 240.13n–1 to 240.13n–12 ("SDR Rules"). See SDR Registration Release, *supra* note 1202.

[1589] *See* U.S. Activity Adopting Release, 81 FR at 8598.

[1590] *See* Registration Adopting Release, 80 FR at 49000, *supra* note 989. Also see U.S. Activity Proposing Release, 80 FR at 27458, *supra* note 9.

As discussed in the economic baseline, extensive cross-market participation of dealers and non-dealer counterparties in swap, security-based swap and reference security markets points to a high degree of market integration. The Commission has sought to harmonize, to the extent practicable, final business conduct requirements with other existing rules, which may result in efficiencies and lower incremental economic costs for cross-registered SBS Entities and their counterparties than might have otherwise resulted.[1591]

Nonetheless, the Commission recognizes—as reflected in the economic analysis—that the final rules establish new requirements applicable to SBS Entities, and that complying with these requirements will entail costs to SBS Entities. In considering the economic consequences of these final rules we have been mindful of the direct and indirect costs these rules will impose on market participants, as well as the effect of various business conduct requirements on the ability of counterparties to transact with SBS Entities. We have considered the likely costs and benefits of the final business conduct requirements for SBS Entities, counterparties in security-based swap markets, investors in reference security markets, as well as stakeholders in special entities, such as taxpayers, pension holders, endowment beneficiaries, and investors in municipal securities. We have also considered how various types of market participants may respond to the obligations and safe harbors in these final rules.

Some of these final rules impose requirements on SBS Dealers only, whereas others apply to transactions by both SBS Dealers and Major SBS Participants. These final rules have considered potential differences between the roles SBS Dealers and Major SBS Participants in security-based swap markets. As discussed in the sections that follow, registered SBS Dealers are expected to intermediate large volumes of security-based swaps and to transact with many hundreds or thousands of counterparties, whereas Major SBS Participants will be holding significant positions in SBS without intermediating significant volumes of deals.[1592] As discussed in Regulation SBSR, SBS Dealers manage large changes in exposure to reference entities (inventory risk).[1593] Large CDS transactions on a particular reference entity create large inventory positions that affect SBS Dealers' exposure to the credit risk of reference assets. SBS Dealers may actively manage inventory risks that they do not want to bear by entering into offsetting contracts that diversify or hedge new risk exposures. Doing so requires finding market participants, typically in the interdealer market, who are willing to act as counterparties to these offsetting contracts.[1594] Further, as discussed above, SBS Dealers observe order flow and may be involved in arranging or structuring security-based swaps, enjoying informational advantages relative to their non-dealer counterparties. In contrast, participants required to register as Major SBS Participants will have accumulated large positions in security-based swaps but have dealing activity below the *de minimis* threshold. As a result of their substantial positions, Major SBS Participants may be susceptible to market risks. We have considered these differences in risks arising from the security-based swap activity of the two types of SBS Entities.

We have also taken into account comments regarding the different application of various business conduct requirements to SBS Dealers and Major SBS Participants,[1595] including one comment that imposition of "dealer-like" obligations on Major SBS Participants may undermine market development, and reduce competition and counterparty choice.[1596] The Commission recognizes that SBS Dealers serve as the points of connection in security-based swap markets, whereas Major SBS Participants may have greater market impacts and risks associated with holding larger security-based swap positions. As discussed in Section II, these final rules are intended to provide counterparty protections and reduce information asymmetries. The Commission is imposing counterparty status verification, disclosure, fair and balanced communications, supervision, antifraud, CCO rules and rules related to counterparties of special entities on both SBS Dealers and Major SBS Participants. The final rules limit the scope of "know your counterparty", suitability, pay to play and certain special entity rules to SBS Dealers. Therefore, counterparties of Major SBS Participants, as well as counterparties of SBS Dealers, may benefit from counterparty protections and information benefits of these final rules. At the same time, Major SBS Participants will not be subject to the full range of business conduct obligations where business conduct requirements are not expressly addressed by the Dodd-Frank Act or the statute applies a requirement only to SBS Dealers. We further discuss these considerations in the sections that follow.

We recognize that costs of rules imposed on Major SBS Participants may be passed on to counterparties in the form of transaction costs or a decreased willingness to intermediate transactions with non-SBS or Swap Entity counterparties. As reflected in the economic baseline, the Commission estimates that of the 55 SBS Entities that may register with the Commission, between zero and five entities may be Major SBS Participants. The

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[1591] A number of commenters recommended the Commission to harmonize external business conduct rules with those of the CFTC. *See, e.g.*, Barnard, *supra* note 5; Levin, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5; NABL, *supra* note 5; Nomura, *supra* note 5; AFGI (July 2013), *supra* note 5; ISDA (July 2013), *supra* note 5; Barnard (July 2015), *supra* note 10; and SIFMA (August 2015), *supra* note 5.

[1592] *See* Definitions Adopting Release, 77 FR at 30751–30756, *supra* note 115.

[1593] *See* Regulation SBSR Adopting Release, 80 FR at 14617, *infra* note 1602.

[1594] *See* "Inventory risk management by dealers in the single-name credit default swap market" (October 17, 2014) at 5, available at *http://www.sec.gov/comments/s7-34-10/s73410-184.pdf*. The analysis uses DTCC–TIW data to describe how SBS Dealers manage inventory risk by hedging. Also see FN14 citing to Hansch, Oliver, Narayan Y. Naik, and S. Viswanathan. "Do inventories matter in dealership markets? Evidence from the London Stock Exchange." The Journal of Finance 53, no. 5 (1998): 1623–1656.

[1595] *See, e.g.*, MFA, *supra* note 5; Blackrock, *supra* note 5; CFA, *supra* note 5.

[1596] *See* MFA, *supra* note 5.

Commission also estimates that non-SBS Entity counterparties may transact with a median of three and an average of four SBS Dealers per year. Should Major SBS Participants become less willing to transact with non-SBS or Swap Entity counterparties, SBS Dealers are likely to step in to intermediate OTC trades. As articulated in prior sections, the Commission believes that imposing certain final business conduct rules on both SBS Dealers and Major SBS Participants may reduce information asymmetries and enhance counterparty protections in security-based swap markets.

Final business conduct rules reflect the informational advantage of SBS Entities relative to other market participants. SBS Dealers enjoy informational advantages over their non-SBS Entity counterparties. As we quantify in the economic baseline, inter-dealer transactions play a significant role in security-based swap markets, and security-based swap activity is highly concentrated among a small number of dealers. SBS Dealers observe deal flow, and may act in other capacities, such as in the capacity of underwriters or arrangers, in relation to reference securities underlying security-based swaps. Major SBS Participants may also be better informed about the risks and valuations of security-based swaps due to their large positions in security-based swaps. Therefore, compared to other counterparties, both SBS Dealers and Major SBS Participants may be better informed and better able to assess material risks and characteristics of security-based swaps. Final disclosure and suitability rules are limited to security-based swap activities between SBS Entities and counterparties that are not themselves SBS or Swap Entities. Other external business conduct rules explicitly address conduct of SBS Entities when they act as counterparties or advisors to special entities, such as employee benefit plans, municipalities and endowments.

The Commission has considered counterparty protections, information asymmetries and risks arising from arm's length and inter-affiliate transactions. Inter-affiliate transactions may be conducted for the purposes of internal risk management within a commonly controlled corporate group with generally aligned incentives and few informational asymmetries, and may involve the same personnel acting in or on behalf of both parties. Imposing business conduct requirements on transactions among various control affiliates of the same SBS Entity is less likely to result in counterparty protections, informational benefits or improvements in allocative efficiency, but would result in additional costs and execution delays for SBS Entities.[1597] Similar to the CFTC's adopted approach, the final business conduct rules 240.15Fh–3(a)–(f), 240.15Fh–4(b), and 240.15F–5 will apply to arm's length transactions and exclude transactions that SBS Entities enter into with their majority-owned affiliates.

The Commission notes that, where possible, it has attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from adopting these rules. In many cases, however, the Commission is unable to quantify the economic effects. Crucially, many of the relevant economic effects, such as counterparty protections, information asymmetry, the ability of less informed market participants to overcome information asymmetries, and the value of Commission enforcement and oversight, are inherently difficult to quantify. In other cases, we lack the information necessary to provide reasonable estimates. For example, we lack data on business conduct practices of U.S. SBS Entities' foreign branches; profitability of SBS Dealer and Major SBS Participant transactions at various volume levels, by type (SEF execution versus OTC/bespoke) and by counterparty (other SBS and Swap Entities, special entities, all other counterparties); the magnitude of the conflicts of interest related to the "pay to play" practices by SBS Entities with respect to special entities and the degree of reliance of dually registered SBS Entities on covered associates already subject to similar prohibitions; and how SBS Entities, new entrants, and counterparties, including those currently not transacting in security-based swap markets, may react to specific business conduct rules. To the best of our knowledge, no such data are publicly available and commenters have not provided data to allow such quantification.

B. Baseline

To assess the economic impact of the final rules described in this release, we are using as our baseline the security-based swap market as it exists at the time of this release, including applicable rules we have already adopted but excluding rules that we have proposed but not yet finalized.[1598] The analysis includes the statutory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act, and rules adopted in the Definitions Adopting Release, the Cross-Border Adopting Release,[1599] the SDR Registration Release,[1600] the SBS Entity Registration Adopting Release,[1601] and the Regulation SBSR Adopting Release,[1602] along with U.S. Activity rules,[1603] as these final rules—even if compliance is not yet required—are part of the existing regulatory landscape that market participants expect to govern their security-based swap activity.

The business conduct rules include a variety of standards for conduct by SBS Entities when they transact with counterparties. While certain requirements apply to SBS Entity transactions with all counterparties, some requirements will affect only SBS Entity transactions with non-SBS or Swap Entities, others distinguish between SBS Dealers and Major SBS Participants, and yet others offer relief for anonymous transactions. The following sections describe current security-based swap market activity, participants, common dealing structures, counterparties, and patterns of cross-border and cross-market participation.

1. Available Data Regarding Security-Based Swap Activity

Our understanding of the market is informed in part by available data on security-based swap transactions, though we acknowledge that limitations in the data limit the extent to which we can quantitatively characterize the market.[1604] Because these data do not cover the entire market, we have developed an understanding of market activity using a sample of transactions data that includes only certain portions of the market. We believe, however, that the data underlying our analysis here provide reasonably comprehensive information regarding single-name CDS transactions and the composition of participants in the single-name CDS market.

[1597] As discussed in Section II.A, *supra*, all commenters recommended not applying these final rules to inter-affiliate transactions. *See* ABA Securities Association, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; SIFMA (August 2015), *supra* note 5.

[1598] We also considered, where appropriate, the impact of rules and technical standards promulgated by other regulators, such as the CFTC and the European Securities and Markets Authority, on practices in the security-based swap market.

[1599] *See* Cross-Border Adopting Release, *supra* note 684.

[1600] *See* SDR Registration Release, *supra* note 1202.

[1601] *See* Registration Adopting Release, *supra* note 989.

[1602] *See* "Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information," Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015) ("Regulation SBSR Adopting Release").

[1603] *See* U.S. Activity Adopting Release 81 FR 8598.

[1604] We also rely on qualitative information regarding market structure and evolving market practices provided by commenters, both in letters and in meetings with Commission staff, and knowledge and expertise of Commission staff.

Specifically, our analysis of the state of the current security-based swap market is based on data obtained from the DTCC Derivatives Repository Limited Trade Information Warehouse ("TIW"), especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2014. According to data published by the Bank for International Settlements ("BIS"), the global notional amount outstanding in single-name CDS was approximately $9.04 trillion,[1605] in multi-name index CDS was approximately $6.75 trillion, and in multi-name, non-index CDS was approximately $611 billion. The total gross market value outstanding in single-name CDS was approximately $366 billion, and in multi-name CDS instruments was approximately $227 billion.[1606] The global notional amount outstanding in equity forwards and swaps as of December 2014 was $2.50 trillion, with total gross market value of $177 billion.[1607] As these figures show (and as we have previously noted), although the definition of security-based swaps is not limited to single-name CDS, single-name CDS contracts make up a majority of security-based swaps, and we believe that the single-name CDS data are sufficiently representative of the market to inform our analysis of the state of the current security-based swap market.[1608]

We note that the data available to us from TIW do not encompass those CDS transactions that both: (i) Do not involve U.S. counterparties; [1609] and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, the TIW data should provide sufficient information to permit us to identify the types of market participants active in the security-based swap market and the general pattern of dealing within that market.[1610]

2. Security-Based Swap Market: Market Participants and Dealing Structures

a. Security-Based Swap Market Participants

Activity in the security-based swap market is concentrated among a relatively small number of entities that act as dealers in this market. In addition to these entities, thousands of other participants appear as counterparties to security-based swap contracts in our sample, and include, but are not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies. We observe that most non-dealer users of security-based swaps do not engage directly in the trading of swaps, but trade through banks, investment advisers, or other types of firms acting as dealers or agents. Based on an analysis of the counterparties to trades reported to the TIW, there are 1,875 entities that engaged directly in trading between November 2006 and December 2014.[1611]

As shown in Table 1, below, close to three-quarters of these entities (DTCC-defined "firms" shown in TIW, which we refer to here as "transacting agents") were identified as investment advisers, of which approximately 40 percent (about 30 percent of all transacting agents) were registered as investment advisers under the Advisers Act.[1612] Although investment advisers comprise the vast majority of transacting agents, the transactions they executed account for only 11.5 percent of all single-name CDS trading activity reported to the TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.*, two transaction counterparties). The vast majority of transactions (83.7 percent) measured by number of transaction-sides were executed by ISDA-recognized dealers.

[1605] The global notional amount outstanding represents the total face amount used to calculate payments under outstanding contracts. The gross market value is the cost of replacing all open contracts at current market prices.

[1606] *See* semi-annual OTC derivatives statistics at December 2014, Table 19, available at *http://www.bis.org/statistics/dt1920a.pdf* (accessed Jul. 29, 2015).

[1607] These totals include both swaps and security-based swaps, as well as products that are excluded from the definition of "swap," such as certain equity forwards.

[1608] While other repositories may collect data on transactions in total return swaps on equity and debt, we do not currently have access to such data for these products (or other products that are security-based swaps). Consistent with the Cross-Border Proposing Release, we believe that data related to single-name CDS provide reasonably comprehensive information for purposes of this analysis, as such transactions appear to constitute roughly 74 percent of the security-based swap market as measured on the basis of gross notional outstanding. *See* Cross-Border Proposing Release, 78 FR 31120 n.1301.

Also consistent with our approach in that release, with the exception of the analysis regarding the degree of overlap between participation in the single-name CDS market and the index CDS market (cross-market activity), our analysis below does not include data regarding index CDS as we do not currently have sufficient information to classify index CDS as swaps or security-based swaps.

[1609] Following publication of the Warehouse Trust Guidance on CDS data access, TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.*, where the account is organized as a legal entity). This physical address is designated the registered office location by TIW. When an account reports a registered office location, we have assumed that the registered office location reflects the place of domicile for the fund or account. When an account does not report a registered office location, we have assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. Thus, for purposes of this analysis, we have classified accounts as "U.S. counterparties" when they have reported a registered office location in the United States. We note, however, that this classification is not necessarily identical in all cases to the definition of "U.S. person" under Exchange Act rule 3a71–3(a)(4).

[1610] The challenges we face in estimating measures of current market activity stem, in part, from the absence of comprehensive reporting requirements for security-based swap market participants. The Commission has adopted rules regarding trade reporting, data elements, and public reporting for security-based swaps that are designed to, when fully implemented, provide the Commission with additional measures of market activity that will allow us to better understand and monitor activity in the security-based swap market. *See* Regulation SBSR Adopting Release, 80 FR at 14699–14700, *supra* note 1602.

[1611] These 1,875 entities, which are presented in more detail in Table 1, below, include all DTCC-defined "firms" shown in TIW as transaction counterparties that report at least one transaction to TIW as of December 2014. The staff in the Division of Economic and Risk Analysis classified these firms, which are shown as transaction counterparties, by machine matching names to known third-party databases and by manual classification. *See, e.g.*, Cross-Border Proposing Release, 78 FR 31120, n. 1304, *supra* note 6. Manual classification was based in part on searches of the EDGAR and Bloomberg databases, the SEC's Investment Adviser Public Disclosure database, and a firm's public Web site or the public Web site of the account represented by a firm. The staff also referred to ISDA protocol adherence letters available on the ISDA Web site.

[1612] *See* 15 U.S.C. 80b1–80b21. Transacting agents participate directly in the security-based swap market, without relying on an intermediary, on behalf of principals. For example, a university endowment may hold a position in a security-based swap that is established by an investment adviser that transacts on the endowment's behalf. In this case, the university endowment is a principal that uses the investment adviser as its transacting agent.

TABLE 1—THE NUMBER OF TRANSACTING AGENTS BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER 2006 THROUGH DECEMBER 2014, REPRESENTED BY EACH COUNTERPARTY TYPE [1613]

Transacting agents	Number	Percent	Transaction share (percent)
Investment advisers	1,425	76.0	11.5
—SEC registered	*571*	*30.5*	*7.7*
Banks	252	13.4	4.3
Pension Funds	27	1.4	0.1
Insurance Companies	38	2.0	0.2
ISDA-Recognized Dealers [1614]	17	0.9	83.7
Other	116	6.2	0.2
Total	1,875	99.9	100

Principal holders of CDS risk exposure are represented by "accounts" in the TIW.[1615] The staff's analysis of these accounts in TIW shows that the 1,875 transacting agents classified in Table 1 represent 10,900 principal risk holders. Table 2, below, classifies these principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.[1616] For instance, banks in Table 1 allocated transactions across 327 accounts, of which 23 were represented by investment advisers. In the remaining 304 instances, banks traded for their own accounts. Meanwhile, ISDA-recognized dealers in Table 1 allocated transactions across 75 accounts.

TABLE 2—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SECURITY-BASED SWAP MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOVEMBER 2006 THROUGH DECEMBER 2014.[1617]

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent [1618]	
Private Funds	3,168	1,569	50%	1,565	49%	34	1%
DFA Special Entities	1,141	1,088	95%	33	3%	20	2%
Registered Investment Companies	800	768	96%	30	4%	2	0%
Banks (non-ISDA-recognized dealers)	327	17	5%	6	2%	304	93%
Insurance Companies	232	150	65%	21	9%	61	26%
ISDA-Recognized Dealers	75	0	0%	0	0%	75	100%
Foreign Sovereigns	72	53	74%	3	4%	16	22%
Non-Financial Corporations	61	43	70%	3	5%	15	25%
Finance Companies	13	6	46%	0	0%	7	54%
Other/Unclassified	5,011	3,327	66%	1,452	29%	232	5%
All	10,900	7,021	64%	3,113	29%	766	7%

Among the accounts, there are 1,141 Dodd-Frank Act-defined special entities [1619] and 800 investment companies registered under the Investment Company Act of 1940.[1620] Private funds comprise the largest type of account holders that we were able to classify, and although not verified through a recognized database, most of the funds we were not able to classify appear to be private funds.[1621]

[1613] Adjustments to these statistics reflect updated classifications of counterparties and transactions classification resulting from further analysis of the TIW data.

[1614] For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo and Nomura. *See, e.g., http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf.*

[1615] "Accounts" as defined in the TIW context are not equivalent to "accounts" in the definition of "U.S. person" provided by Exchange Act rule 3a71-3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person may have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

[1616] Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act and may include investment advisers registered with a state or a foreign authority.

[1617] Adjustments to these statistics reflect updated classifications of counterparties and transactions classification resulting from further analysis of the TIW data.

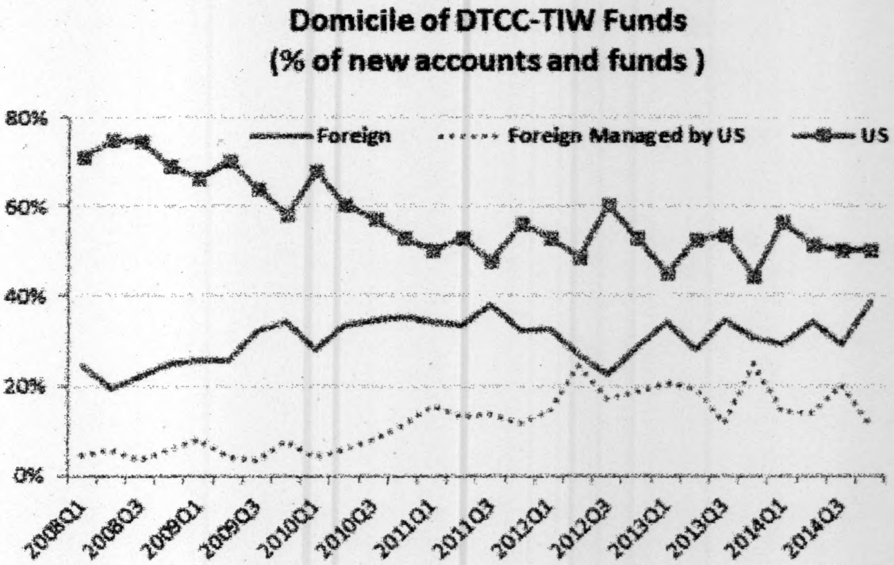
[1618] This column reflects the number of participants who are also trading for their own accounts.

[1619] Our manual classification does not distinguish between special entities subject to ERISA and special entities defined in, but not subject to ERISA, and this estimate includes both groups of entities. Therefore, our analysis includes entities that may opt out of the special entity status under these final rules. If many such entities opt out, this figure may overestimate the number of market participants subject to business conduct standards with regards to special entities. See Section VI.C.4.

[1620] *See* 15 U.S.C. 80a1–80a64. There remain approximately 5,000 DTCC "accounts" unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

[1621] For the purposes of this discussion, "private fund" encompasses various unregistered pooled investment vehicles, including hedge funds, private equity funds, and venture capital funds.

Figure 1: The percentage of (1) new accounts with a domicile in the United States (referred to as "US"), (2) new accounts with a domicile outside the United States that are associated with a firm that also has a domicile outside the United States (referred to below as "Foreign"), and (3) new accounts with a domicile outside the United States that are associated with a firm that has a domicile in the United States, (collectively referred to below as "Foreign Managed by US").[1622] Unique new accounts are aggregated, and percentages are computed, on a quarterly basis, from January 2008 through December 2014.



b. Participant Domiciles

As depicted in Figure 1 above, domiciles of new accounts participating in the market have shifted over time. It is unclear whether these shifts represent changes in the types of participants active in this market, changes in reporting or changes in transaction volumes in particular underliers. For example, the increased percentage of new entrants that are foreign accounts may reflect an increase in participation by foreign account holders in the security-based swap market, and the increased percentage of the subset of new entrants that are foreign accounts managed by U.S. persons also may reflect more specifically the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other stimuli.[1623] On the other hand, apparent changes in the percentage of new accounts with foreign domiciles may reflect improvements in reporting by market participants to TIW, an increase in the percentage of transactions between U.S. and non-U.S. counterparties, and/or increased transactions in single-name CDS on U.S. reference entities by foreign persons.[1624]

c. Market Centers

A market participant's domicile, however, does not necessarily correspond to where it engages in security-based swap activity. In particular, financial groups engaged in security-based swap dealing activity operate in multiple market centers and carry out such activity with counterparties around the world.[1625] Several commenters noted that many market participants that are engaged in dealing activity prefer to use traders and manage risk for security-based swaps in the jurisdiction where the underlier is traded. Thus, although a significant amount of the dealing activity in security-based swaps on U.S. reference entities involves non-U.S. dealers, we understand that these dealers tend to carry out much of the security-based swap trading and related risk-management activities in these security-based swaps within the United States.[1626] Some dealers have explained that being able to centralize their trading, sales, risk management and other activities related to U.S. reference entities in U.S. operations (even when the resulting transaction is booked in a foreign entity) improves the efficiency of their dealing business.

Consistent with these operational concerns and the global nature of the security-based swap market, the available data appear to confirm that participants in this market are in fact active in market centers around the globe. Although, as noted above, the available data do not permit us to identify the location of personnel in a transaction, TIW transaction records indicate that firms that are likely to be security-based swap dealers operate out of branch locations in key market centers around the world, including New York, London, Tokyo, Hong Kong, Chicago, Sydney, Toronto, Frankfurt, Singapore and the Cayman Islands.[1627]

[1622] *See* Section VI.B.1, *supra* (explaining how domiciles for firms were identified for purposes of this analysis).

[1623] *See* Charles Levinson, "U.S. banks moved billions in trades beyond the CFTC's reach," Reuters (Aug. 21, 2015), available at: *http://www.reuters.com/article/2015/08/21/usa-banks-swaps-idUSL3N10S57R20150821.*

[1624] As noted above, the available data do not include all security-based swap transactions but only transactions in single name CDS that involve either (1) at least one account domiciled in the United States (regardless of the reference entity) or (2) single-name CDS on a U.S. reference entity (regardless of the U.S.-person status of the counterparties).

[1625] *See* U.S. Activity Proposing Release, 80 FR 27449–27452, *supra* note 9.

[1626] *See id.*

Given these market characteristics and practices, participants in the security-based swap market may bear the financial risk of a security-based swap transaction in a location different from the location where the transaction is arranged, negotiated, or executed, or where economic decisions are made by managers on behalf of beneficial owners. Market activity may also occur in a jurisdiction other than where the market participant or its counterparty books the transaction. Similarly, a participant in the security-based swap market may be exposed to counterparty risk from a counterparty located in a jurisdiction that is different from the market center or centers in which it participates.

d. Common Business Structures for Firms Engaged in Security-Based Swap Dealing Activity

A financial group that engages in a global security-based swap dealing business in multiple market centers may choose to structure its dealing business in a number of different ways. This structure, including where it books the transactions that constitute that business and how it carries out market-facing activities that generate those transactions, reflects a range of business and regulatory considerations, which each financial group may weigh differently.

A financial group may choose to book all of its security-based swap transactions, regardless of where the transaction originated, in a single, central booking entity. That entity generally retains the risk associated with that transaction, but it also may lay off that risk to another affiliate via a back-to-back transaction or an assignment of the security-based swap.[1628] Alternatively, a financial group may book security-based swaps arising from its dealing business in separate affiliates, which may be located in the jurisdiction where it originates the risk associated with the security-based swap, or, alternatively, the jurisdiction where it manages that risk. Some financial groups may book transactions originating in a particular region to an affiliate established in a jurisdiction located in that region.[1629]

Regardless of where a financial group determines to book its security-based swaps arising out of its dealing activity, it is likely to operate offices that perform sales or trading functions in one or more market centers in other jurisdictions. Maintaining sales and trading desks in global market centers permits the financial group to deal with counterparties in that jurisdiction or in a specific geographic region, or to ensure that it is able to provide liquidity to counterparties in other jurisdictions,[1630] for example, when a counterparty's home financial markets are closed. A financial group engaged in a security-based swap dealing business also may choose to manage its trading book in particular reference entities or securities primarily from a trading desk that can take advantage of local expertise in such products or that can gain access to better liquidity, which may permit it to more efficiently price such products or to otherwise compete more effectively in the security-based swap market. Some financial groups prefer to centralize risk management, pricing, and hedging for specific products with the personnel responsible for carrying out the trading of such products to mitigate operational risk associated with transactions in those products.

The financial group affiliate that books these transactions may carry out related market-facing activities, whether in its home jurisdiction or in a foreign jurisdiction, using either its own personnel or the personnel of an affiliated or unaffiliated agent. For example, the financial group may determine that another affiliate in the financial group employs personnel who possess expertise in relevant products or who have established sales relationships with key counterparties in a foreign jurisdiction, making it more efficient to use the personnel of the affiliate to engage in security-based swap dealing activity on its behalf in that jurisdiction. In these cases, the affiliate that books these transactions and its affiliated agent may operate as an integrated dealing business, each performing distinct core functions in carrying out that business.

Alternatively, the financial group affiliate that books these transactions may in some circumstances, determine to engage the services of an unaffiliated agent through which it can engage in dealing activity. For example, a financial group may determine that using an interdealer broker may provide an efficient means of participating in the interdealer market in its own, or in another, jurisdiction, particularly if it is seeking to do so anonymously or to take a position in products that trade relatively infrequently.[1631] A financial group may also use unaffiliated agents that operate at its direction. Such an arrangement may be particularly valuable in enabling a financial group to service clients or access liquidity in jurisdictions in which it has no security-based swap operations of its own.

We understand that financial group affiliates (whether affiliated with U.S.-based financial groups or not) that are established in foreign jurisdictions may use any of these structures to engage in dealing activity in the United States, and that they may seek to engage in dealing activity in the United States to transact with both U.S.-person and non-U.S.-person counterparties. In transactions with non-U.S.-person counterparties, these foreign affiliates may affirmatively seek to engage in dealing activity in the United States because the sales personnel of the non-U.S.-person dealer (or of its agent) in the United States have existing relationships with counterparties in other locations (such as Canada or Latin America) or because the trading personnel of the non-U.S.-person dealer (or of its agent) in the United States have the expertise to manage the trading books for security-based swaps on U.S. reference securities or entities. We understand that some of these foreign affiliates engage in dealing activity in the United States through their personnel (or personnel of their affiliates) in part to ensure that they are able to provide their own counterparties, or those of financial group affiliates in other jurisdictions, with access to liquidity (often in non-U.S. reference entities) during U.S. business hours, permitting them to meet client demand even when the home markets are closed. In some cases, such as when seeking to transact with other dealers through an interdealer broker, these foreign affiliates may act, in a dealing capacity, in the United States through an unaffiliated, third-party agent.

[1627] TIW transaction records contain a proxy for the domicile of an entity, which may differ from branch locations, which are separately identified in the transaction records.

[1628] *See* U.S. Activity Proposing Release, 80 FR 27463, *supra* note 9; Cross-Border Proposing Release, 78 FR 30977–78, *supra* note 6.

[1629] There is some indication that this booking structure is becoming increasingly common in the market. *See, e.g.,* "Regional swaps booking replacing global hubs," Risk.net (Sep. 4, 2015), available at: *http://www.risk.net/risk-magazine/feature/2423975/regional-swaps-booking-replacing-global-hubs.* Such a development may be reflected in the increasing percentage of new entrants that have a foreign domicile, as described above.

[1630] These offices may be branches or offices of the booking entity itself, or branches or offices of an affiliated agent, such as, in the United States, a registered broker-dealer.

[1631] We understand that interdealer brokers may provide voice or electronic trading services that, among other things, permit dealers to take positions or hedge risks in a manner that preserves their anonymity until the trade is executed. These interdealer brokers also may play a particularly important role in facilitating transactions in less-liquid security-based swaps.

e. Current Estimates of Number of SBS Dealers and Major SBS Participants

As discussed above, security-based swap activity is concentrated in a relatively small number of dealers, which already represent a small percentage of all market participants active in the security-based swap market. Based on analysis of 2014 data, our earlier estimates of the number of entities likely to register as security-based swap dealers remain largely unchanged.[1632] Of the approximately 50 entities that we estimate may potentially register as security-based swap dealers, we believe it is reasonable to expect 22 to be non-U.S. persons.[1633] Under the rules as they currently exist, we identified approximately 170 entities engaged in single-name CDS activity, with all counterparties, of $2 billion or more. Of those entities, 155 would be expected to incur assessment costs to determine whether they meet the "security-based swap dealer" definition. Approximately 57 of these entities are non-U.S. persons.

Many of these dealers are already subject to other regulatory frameworks under U.S. law based on their role as intermediaries or on the volume of their positions in other products, such as swaps. Available data supports our prior estimates, based on our experience and understanding of the swap and security-based swap market that of the 55 firms that might register as SBS Dealers or Major SBS Participants, approximately 35 would also be registered with the CFTC as Swap Dealers or Major Swap Participants.[1634] Based on our analysis of TIW data and filings with the Commission, we estimate that 16 market participants expected to register as SBS Dealers have already registered with the Commission as broker-dealers and are thus subject to Exchange Act and FINRA requirements applicable to such entities. Finally, as we discuss below, some dealers may be subject to similar requirements in one or more foreign jurisdictions.

3. Security-Based Swap Market: Levels of Security-Based Swap Trading Activity

As already noted, firms that act as dealers play a central role in the security-based swap market. Based on an analysis of 2014 single name CDS data in TIW, accounts of those firms that are likely to exceed the SBS Dealer *de minimis* thresholds and trigger registration requirements intermediated transactions with a gross notional amount of approximately $8.5 trillion, over 60 percent of which was intermediated by top 5 dealer accounts.[1635]

These dealers transact with hundreds or thousands of counterparties. Approximately 35 percent of accounts of firms expected to register as SBS Dealers and observable in TIW have entered into security-based swaps with over 1,000 unique counterparty accounts as of year-end 2014. [1636] Approximately 9 percent of these accounts transacted with 500–1,000 unique counterparty accounts; another 35 percent transacted with 100–500 unique accounts, and only 22 percent of these accounts intermediated swaps with fewer than 100 unique counterparties in 2014. The median dealer account transacted with 453 unique accounts (with an average of approximately 759 unique accounts). Non-dealer counterparties transact almost exclusively with these dealers. The median non-dealer counterparty transacted with 3 dealer accounts (with an average of approximately 4 dealer accounts) in 2014.

Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to the TIW between January 2008 and December 2014, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty.

Figure 2 also shows that the portion of the notional volume of North American corporate single-name CDS represented by interdealer transactions has remained fairly constant and that interdealer transactions continue to represent a significant majority of trading activity even as notional volume has declined over the past six years,[1637] from more than $6 trillion in 2008 to less than $3 trillion in 2014.[1638] The high level of interdealer trading activity reflects the central position of a small number of dealers, each of which intermediates trades with many hundreds of counterparties. While we are unable to quantify the current level of trading costs for single-name CDS, those dealers appear to enjoy market power as a result of their small number and the large proportion of order flow they privately observe.

Figure 2: Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer.

[1632] *See* Registration Adopting Release, 80 FR 49000, *supra* note 989.

[1633] These estimates are based on the number of accounts in TIW data with total notional volume in excess of *de minimis* thresholds, increased by a factor of two, to account for any potential growth in the security-based swap market, to account for the fact that we are limited in observing transaction records for activity between non-U.S. persons to those that reference U.S. underliers, and to account for the fact that we do not observe security-based swap transactions other than in single-name CDS. *See* U.S. Activity Proposing Release, 80 FR 27452, *supra* note 9. *See also* Definitions Adopting Release, 77 FR 30725, n.1457, *supra* note 115.

[1634] Based on our analysis of 2014 TIW data and the list of swap dealers provisionally registered with the CFTC, and applying the methodology used in the Definitions Adopting Release, we estimate that substantially all registered security-based swap dealers would also be registered as swap dealers with the CFTC. *See* U.S. Activity Proposing Release, 80 FR 27458, *supra* note 9; Registration Adopting Release, 80 FR 49000, *supra* note 989. *See also* CFTC list of provisionally registered swap dealers, available at: *http://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer.*

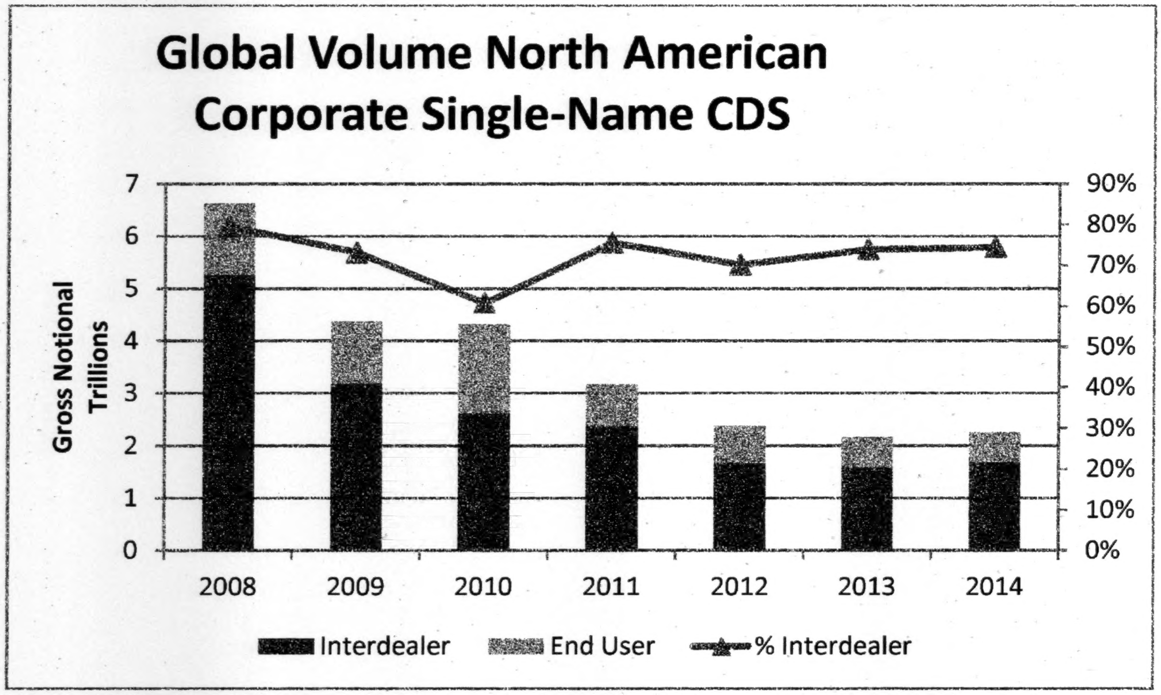
[1635] Commission staff analysis of TIW transaction records indicates that approximately 99 percent of single name CDS price-forming transactions in 2014 involved an ISDA-recognized dealer.

[1636] Many dealer entities and financial groups transact through numerous accounts. Given that individual accounts may transact with hundreds of counterparties, we may infer that entities and financial groups, which may have multiple accounts, transact with at least as many counterparties as the largest of their accounts in terms of number of counterparties.

[1637] The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder, which is important to note for the purpose of understanding the economic baseline for this rulemaking.

[1638] This estimate is lower than the gross notional amount of $8.5 trillion noted above as it includes only the subset of single-name CDS referencing North American corporate documentation, as discussed above.

Figure 2: Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer. [1639]



Against this backdrop [1639] of declining North American corporate single-name CDS activity, about half of the trading activity in North American corporate single-name CDS reflected in the set of data we analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad, as shown in Figure 3 below. Using the self-reported registered office location of the TIW accounts as a proxy for domicile, we estimate that only 12 percent of the global transaction volume by notional volume between 2008 and 2014 was between two U.S.-domiciled counterparties, compared to 48 percent entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 40 percent entered into between two foreign-domiciled counterparties.[1640]

If we consider the number of cross-border transactions instead from the perspective of the domicile of the corporate group (*e.g.*, by classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the percentages shift significantly. Under this approach, the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 32 percent, and to 51 percent for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.

By contrast, the proportion of activity between two foreign-domiciled counterparties drops from 40 percent to 17 percent. This change in respective shares based on different classifications suggests that the activity of foreign subsidiaries of U.S. firms and foreign branches of U.S. banks accounts for a higher percentage of security-based swap activity than U.S. subsidiaries of foreign firms and U.S. branches of foreign banks. It also demonstrates that financial groups based in the United States are involved in an overwhelming majority (approximately 83 percent) of all reported transactions in North American corporate single-name CDS.

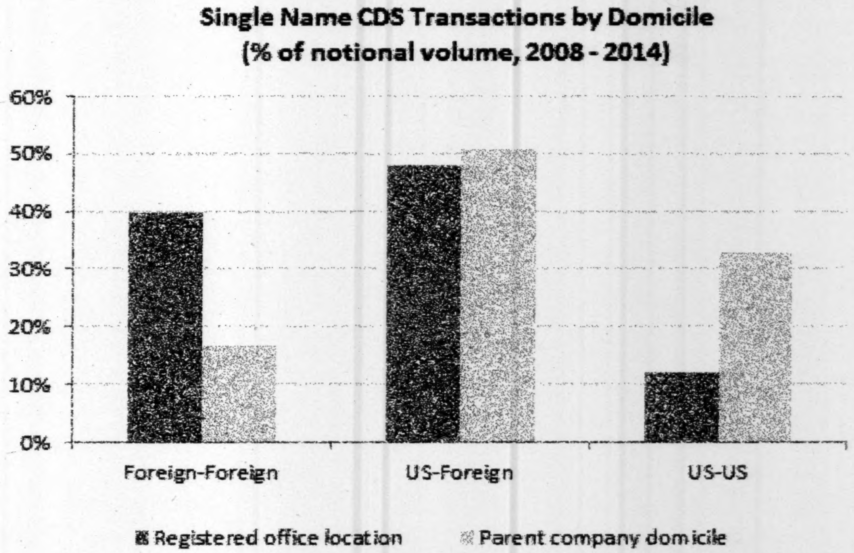
Financial groups based in the United States are also involved in a majority of interdealer transactions in North American corporate single-name CDS. Of transactions on North American corporate single-name CDS between two ISDA-recognized dealers and their branches or affiliates, 65 percent of transaction notional volume involved at least one account of an entity with a U.S. parent.

In addition, we note that a significant majority of North American corporate single-name CDS transactions occur in the interdealer market or between dealers and non-U.S.-person non-dealers, with the remaining (and much smaller) portion of the market consisting of transactions between dealers and U.S.-person non-dealers. Specifically, 79.5 percent of North American corporate single-name CDS transactions involved either two ISDA-recognized dealers or an ISDA-recognized dealer and a non-U.S.-person non-dealer. Approximately 20 percent of such transactions involved an ISDA-recognized dealer and a U.S.-person non-dealer.

[1639] Adjustments to these statistics from the proposal reflect additional analysis of TIW data. *Cf.* Registration Adopting Release, 80 FR 49001, *supra* note 989 (showing slightly different values for 2012 through 2014). For the purposes of this analysis, we assume that same-day cleared transactions reflect inter-dealer activity.

[1640] For purposes of this discussion, we have assumed that the registered office location reflects the place of domicile for the fund or account, but we note that this domicile does not necessarily correspond to the location of an entity's sales or trading desk. *See* U.S. Activity Adopting Release, 81 FR 8607.

Figure 3: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2014.



4. Global Regulatory Efforts

In 2009, leaders of the G20—whose membership includes the United States, 18 other countries, and the European Union ("EU")—addressed global improvements in the OTC derivatives markets. They expressed their view on a variety of issues relating to OTC derivatives contracts. In subsequent summits, the G20 leaders have returned to OTC derivatives regulatory reform and encouraged international consultation in developing standards for these markets.[1841]

Many SBS Dealers likely will be subject to foreign regulation of their security-based swap activities that are similar to regulations that may apply to them pursuant to Title VII, even if the relevant foreign jurisdictions do not classify certain market participants as "dealers" for regulatory purposes. Some of these regulations may duplicate, and in some cases conflict with, certain elements of the Title VII regulatory framework.

Foreign legislative and regulatory efforts have focused on five general areas: Moving OTC derivatives onto organized trading platforms, requiring central clearing of OTC derivatives, requiring post-trade reporting of transaction data for regulatory purposes and public dissemination of anonymized versions of such data, establishing or enhancing capital requirements for non-centrally cleared OTC derivatives transactions, and establishing or enhancing margin and other risk mitigation requirements for non-centrally cleared OTC derivatives transactions. Foreign jurisdictions have been actively implementing regulations in connection with each of these categories of requirements. Regulatory transaction reporting requirements are in force in a number of jurisdictions including the EU, Hong Kong SAR, Japan, Australia, Brazil, Canada, China, India, Indonesia, South Korea, Mexico, Russia, Saudi Arabia, and Singapore; other jurisdictions are in the process of proposing legislation and rules to implement these requirements.[1842] In addition, a number of major foreign jurisdictions have initiated the process of implementing margin and other risk mitigation requirements for non-centrally cleared OTC derivatives transactions.[1843] Several jurisdictions have also taken steps to implement the Basel III recommendations governing capital requirements for financial entities, which include enhanced capital charges for non-centrally cleared OTC derivatives transactions.[1844]

[1841] *See, e.g.*, G20 Leaders' Final Declaration, November 2011, para. 24 available at: *https://g20.org/wp-content/uploads/2014/12/Declaration_eng_Cannes.pdf.*

[1842] Information regarding ongoing regulatory developments described in this section was primarily obtained from progress reports on implementation of OTC derivatives market reforms published by the Financial Stability Board. These are available at: *http://www.financialstabilityboard.org/publications/progress-reports/?policy_area[]=17.*

[1843] In November 2015, the Financial Stability Board reported that 12 member jurisdictions participating in its tenth progress report on OTC derivatives market reforms had in force a legislative framework or other authority to require exchange of margin for non-centrally cleared transactions and had published implementing standards or requirements for consultation or proposal. A further 11 member jurisdictions had a legislative framework or other authority in force or published for consultation or proposal. *See* Financial Stability Board, OTC Derivatives Market Reforms Tenth Progress Report on Implementation (November 2015), available at *http://www.financialstabilityboard.org/wp-content/uploads/OTC-Derivatives-10th-Progress-Report.pdf.*

[1844] In November 2015, the Financial Stability Board reported that 18 member jurisdictions participating in its tenth progress report on OTC derivatives market reforms had in force standards or requirements covering more than 90% of

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5. Dually Registered Entities

We expect the magnitude of the above economic costs, benefits, and effects on efficiency, competition and capital formation to depend on the extent to which SBS Entities are already complying with similar business conduct rules. As discussed extensively in the baseline and in the sections that follow, most entities expected to register with the Commission and become subject to these final business conduct standards have registered with the CFTC as Swap Entities or with the Commission as broker-dealers. Therefore, they have already become subject to CFTC's adopted external business conduct rules and/or FINRA rules related to, among others, suitability, communications with the public, supervision, and compliance. The Commission has sought to harmonize the regulatory regimes in recognition of swap and security-based swap market integration and extensive cross-market participation. As a result, some SBS Entities may have already restructured their activities to comply with many of the substantive business conduct standards being adopted. Dually registered SBS Entities that have already restructured their systems and activities to comply with parallel CFTC and FINRA rules may incur lower costs relative to non-dually registered SBS Entities. The specific economic costs, benefits, and effects on efficiency, competition, and capital formation of various business conduct rules and requirements are discussed in further detail in the sections that follow. Wherever practicable, we also evaluate the economic effects of the various rules being adopted against these parallel rules, and other reasonable alternatives.

6. Cross-Market Participation

As noted above, persons registered as SBS Dealers and Major SBS Participants are likely also to engage in swap activity, which is subject to regulation by the CFTC.[1645] This overlap reflects the relationship between single-name CDS contracts, which are security-based swaps, and index CDS contracts, which may be swaps or security-based swaps. A single-name CDS contract covers default events for a single reference entity or reference security. Index CDS contracts and related products make payouts that are contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. A default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, prices of these products depend upon one another,[1646] creating hedging opportunities across these markets.

These hedging opportunities mean that participants that are active in one market are likely to be active in the other. Commission staff analysis of approximately 4,500 TIW accounts that participated in the market for single-name CDS in 2014 revealed that approximately 3,000 of those accounts, or 67 percent, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2014 suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 64 percent; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 10 percent.[1647]

Similarly, since the payoffs of security-based swaps are dependent upon the value of underlying securities, activity in the security-based swap market can be correlated with activity in underlying securities markets. Security-based swaps may be used in order to hedge or speculate on price movements of reference securities or the credit risk of reference securities. For instance, prices of both CDS and corporate bonds are sensitive to the credit risk of underlying reference securities. As a result, trading across markets may sometimes result in information and risk spillovers between these markets, with informational efficiency, pricing and liquidity in the security-based swap market affecting informational efficiency, pricing, and liquidity in markets for related assets, such as equities and corporate bonds.[1648]

7. Pay to Play Prohibitions

The baseline against which we are assessing the potential effects of the pay to play prohibitions in these final business conduct rules reflects MSRB Rules G–37 and G–38, SEC Rule 206(4)–5 under the Advisers Act, as well as CFTC Regulation 23.451. First, we note that MSRB rules G–37 and G–38 are currently effective and are part of the economic baseline. Second, Rule 206(4)–5 prohibits an adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any third party for solicitation of advisory business from any government entity on such adviser's behalf unless such third party is a "regulated person," defined in Rule 206(4)–5 as (i) an SEC-registered investment adviser, (ii) a registered broker or dealer subject to pay-to-play rules adopted by a registered national securities association, or (iii) a registered municipal advisor that is subject to pay-to-play rules adopted by the MSRB ("third-party solicitor ban"). Although the compliance date for the third-party solicitor ban was July 31, 2015, the Division of Investment Management stated that it will not

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transactions that require enhanced capital charges for non-centrally cleared transactions. A further three member jurisdictions had a legislative framework or other authority in force and had adopted implementing standards or requirements that were not yet in force. An additional three member jurisdictions had a legislative framework or other authority in force or published for consultation or proposal. *See* Financial Stability Board, OTC Derivatives Market Reforms Tenth Progress Report on Implementation (November 2015), available at *http://www.financialstabilityboard.org/wp-content/uploads/OTC-Derivatives-10th-Progress-Report.pdf.*

[1645] *See* U.S. Activity Adopting Release, 81 FR 8609; Registration Adopting Release, 80 FR 49000, *supra* note 989.

[1646] "Correlation" typically refers to linear relationships between variables; "dependence" captures a broader set of relationships that may be more appropriate for certain swaps and security-based swaps. *See, e.g.,* Casella, George and Roger L. Berger, "Statistical Inference" (2002), at 171.

[1647] The Commission recently revised its methodology for estimating cross-market participation of TIW accounts. This has resulted in an increase in the reported number of accounts that participated in both markets relative to previous Commission releases.

[1648] *See* the Registration Adopting Release, 80 FR 49003, *supra* note 989. Empirical evidence on the direction and significance of the CDS-bond market spillover is mixed. *See also* Massa and Zhang (2012) Massa & L. Zhang, CDS and the Liquidity Provision in the Bond Market (INSEAD Working Paper No. 2012/114/FIN, 2012), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164675* (considering whether the presence of CDS improves pricing and liquidity of investment grade bonds in 2001–2009); S. Das, M. Kalimipalli & S. Nayak, Did CDS Trading Improve the Market for Corporate Bonds?, 111 J. Fin. Econ. 495 (2014) (considering the effects of CDS trading on the efficiency, pricing error and liquidity of corporate bond markets); M. Oehmke & A. Zawadowski, The Anatomy of the CDS Market, Rev. of Fin. Studies (forthcoming), available at *https://www0.gsb.columbia.edu/faculty/moehmke/papers/OehmkeZawadowski_CDS.pdf* (suggesting a standardization and liquidity role of CDS markets and documenting cross-market arbitrage links between the CDS market and the bond market); and Boehmer, S. Chava, & H. Tookes, Related Securities and Equity Market Quality: The Cases of CDS, 50(3) J. Fin. & Quant. Analysis (2015), pp 509–541 (providing evidence that firms with traded CDS contracts on their debt experience significantly lower liquidity and price efficiency in equity markets when these firms are closer to default and in times of high market volatility).

recommend enforcement action to the Commission with respect to the third-party solicitor ban until the later of (1) the effective date of a FINRA pay-to-play rule or (2) the effective date of an MSRB pay-to-play rule for registered municipal advisors.[1649] Therefore, certain parts of Rule 206(4)–5—the prohibition from receiving compensation for advising government entities for two years after certain contributions are made, and the prohibition from coordinating and soliciting contributions to government officials and parties—enter into our economic baseline.

Third, Commodity Exchange Act Rule 23.451 prohibits Swap Dealers from offering to enter or entering into a swap with governmental special entities within two years of any contribution to an official of such entity by the Swap Dealer or any covered associate. The CFTC has similarly stated that the rule is intended to deter fraud and undue influence that harms the public, and to promote consistency in the business conduct standards that apply to financial market professionals dealing with municipal entities. However, CFTC Letter No. 12–33 provided no-action relief from Regulation 23.451 to Swap Dealers and their covered associates with respect to "governmental plans" defined in Section 3 of ERISA, to the extent that such plans are not otherwise covered by SEC and/or MSRB rules. The CFTC has also clarified that the two year "look-back" period does not include any time period that precedes the date on which an entity is required to register as a Swap Dealer.[1650]

As indicated above, we estimate that up to 35 of 55 entities seeking to register as SBS Entities may be registered with the CFTC as Swap Entities. Additionally, based on an analysis of 2014 TIW data on accounts likely to trigger SBS Dealer registration requirements, we have identified 18 entities belonging to a corporate group with at least one MSRB registered broker-dealer or bank-dealer.[1651] Finally, as discussed in section V, the Commission continues to estimate that the overwhelming majority of independent representatives of special entities subject to these final rules are likely already registered as municipal advisors.[1652] As a result of the pay to play rules currently in effect, some SBS Entities and third-party independent advisers of special entities may have restructured their business practices in various markets to comply with certain restrictions imposed by pay to play rules on investment advisers, municipal advisors, and SBS Entities discussed above.

C. Costs and Benefits of Business Conduct Rules

1. Verification of Status and Know Your Counterparty Rules

Rule 15Fh–3(a)(1) requires an SBS Entity to verify that a counterparty meets the standards for an eligible contract participant before entering into a security-based swap with the counterparty, except for transactions executed on a registered national securities exchange. Rule 15Fh–3(a)(2) requires SBS Entities to verify whether a known counterparty is a special entity before entering into a security-based swap with that counterparty, except for transactions executed on a registered or exempt SEF or registered national securities exchange, where the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit compliance with obligations of the rule. Rule 15Fh–3(a)(3) requires SBS Entities to verify whether a counterparty is eligible to elect not to be a special entity under Rule 15Fh–2(d)(4) and, if so, notify such counterparty of its right to make such an election.[1653] Finally, Rule 15Fh–3(e) requires that SBS Dealers establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain records of the essential facts concerning each known counterparty necessary for conducting business with such counterparties. The scope of such essential facts includes facts required to comply with applicable laws, regulations and rules; facts required to implement the SBS Dealer's credit and operational risk management policies; and information regarding the authority of persons acting for such counterparties.[1654]

We recognize that many SBS Entities, in the course of business, already may be conducting due diligence and fact gathering concerning their security-based swap counterparties, which may reduce the economic effects of this rule.

The scope of the "know your counterparty" rule reflects differences in the roles of entities likely to register as SBS Dealers and entities that may register as Major SBS Participants. The Commission believes that entities that will register as SBS Dealers will intermediate a large volume of security-based swap transactions as both principal risk holders and agents transacting on behalf of principal risk holders, such as special entities. As discussed in the economic baseline, we understand that entities currently operating as dealers in security-based swap markets play a central intermediation role, transacting with hundreds and thousands of non-dealer counterparties and accounting for large activity volumes. At the same time, the Commission expects that Major SBS Participants will hold large positions in security-based swaps, but have low volumes of security-based swap activity. Hence, we expect Major SBS Participants may not play the central intermediation role fulfilled by SBS Dealers.

These rules limit the scope of application of the "know your counterparty" requirement to SBS Dealers, and exclude Major SBS Participants. As a result, entities that may register as Major SBS Participants will not bear the costs of compliance with this rule. At the same time, SBS Dealers will be required to comply and bear related compliance costs. We note that this approach is substantially similar to the CFTC's final external business conduct rules, which limit the scope of "know your counterparty" requirements to Swap Dealers. This results in a consistent treatment of entities that may trigger both Major Swap Participant and Major SBS Participant registration requirements, and will enable Major Swap Participants to enter into security-based swap positions without bearing additional compliance costs to comply with our "know your counterparty" requirement.

[1649] *See* "Staff Responses to Questions About the Pay to Play Rule," Question I.4, updated as of Jun. 25, 2015. Available at: *http://www.sec.gov/divsions/investment/pay-to-play-faq.htm*, last accessed 4/6/2016.

[1650] *See* CFTC 77 FR at 9827. *See also:* CFTC No-Action Letter No. 12–33 Amended, available at *http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-33.pdf*, last accessed 8/27/2015.

[1651] See "Broker-Dealers and Bank Dealers Registered with the MSRB", available at *http://www.msrb.org/BDRegistrants.aspx*, last accessed 2/8/2016.

[1652] As of January 1, 2016 there were 665 municipal advisors registered with the Commission (*http://www.sec.gov/help/foia-docs-muniadvisorshtm.html*). Of those, 381 indicated that they expect to provide advice concerning the use of municipal derivatives or advice or recommendations concerning the selection of other municipal advisors or underwriters with respect to municipal financial products or the issuance of municipal securities. We expect that many of these municipal advisors will also act as independent representatives for other special entities. As discussed in Section V, the Commission estimates that approximately 385 municipal advisors will act as independent representatives to special entities with respect to security-based swaps.

[1653] *See* Section II.H supra.

[1654] The ability of SBS Entities to rely on representations to comply with these and other business conduct rules is discussed in detail in the section VI.C.4 below.

To the extent that SBS Dealers do not already collect and retain essential facts about their counterparties as a part of their normal course of business, this requirement will increase the cost to SBS Dealers of entering into security-based swaps. Specifically, SBS dealers will incur costs of complying with the verification requirements and costs of establishing, maintaining, and enforcing policies and procedures reasonably designed to obtain and retain essential facts about each known counterparty that are necessary for conducting business with such counterparty. We note that the ability to rely on counterparty representations to fulfill the SBS Dealer diligence requirement partly lowers compliance burdens, as reflected in our estimates. Further, to the extent that the majority of SBS Entities have already cross-registered with the CFTC as Swap Entities and have become subject to substantially similar verification and "know your counterparty" requirements, and to the extent the majority of their counterparties transact across swap and security-based swap markets and have already benefited from existing CFTC rules, the economic effects of these final rules may be partly mitigated.

Direct costs of compliance with verification of status requirements related to adherence to standardized protocols by SBS Entities that are not dually registered as Swap Entities are estimated at, approximately, $17,600.[1655] As discussed in Section V, these estimates include costs related to verification of counterparty's eligibility to elect not to be a special entity and notification of counterparties of their right to make such an election. In addition, SBS Dealers will also be required to comply with "know your counterparty" obligations, which will require a review of existing policies and procedures and related documentation, involving an estimated initial cost of $95,000 for all SBS Dealers.[1656] Further, direct ongoing costs of "know your counterparty" obligations are estimated at approximately $4,370,000 per year for all SBS Dealers.[1657]

Increases in SBS Entity costs due to these obligations may be reflected in the terms offered to counterparties, and increases in counterparty costs may affect their willingness to transact in security-based swaps. Further, counterparties of SBS Entities that are not also participating in swap markets and relying on the above protocols may incur costs associated with the verification of status requirement and related adherence letters, estimated at approximately $3,051,840.[1658] As estimated in Section V, counterparties or their agents will also be required to collect and provide essential facts to the SBS Dealer to comply with the "know your counterparty" obligations for an initial total cost estimate of approximately $41,420,000.[1659]

We note that the eligible contract participant status verification requirement does not apply to transactions executed on a registered national securities exchange. In addition, the special entity status verification requirement does not apply to transactions where the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit compliance. This limits the scope of the transactions covered by final rules, therefore potentially reducing the expected benefits. However, since anonymous transactions will not be subject to these requirements, the rule imposes lower costs, delays and implementation challenges with respect to anonymous trades. This approach to anonymous transactions executed on registered exchanges or SEFs may incentivize SBS Entities to trade through these venues, to avoid imposition of these obligations under final business conduct rules. The compliance costs imposed on SBS Entities by these and other business conduct requirements (excluding anonymous transactions executed on a registered exchange or SEF) may lead to a decrease in the volume of OTC bilateral security-based swap trades, and an increase in the volume of transactions executed on exchanges or SEFs. This may facilitate liquidity, price discovery and risk mitigation in these transparent venues, which may attract greater market participation. The overall effects will depend on the value of disclosure and suitability requirements, customization and bilateral relationships in OTC transactions, compared with the standardization, liquidity and execution quality of contracts in SEFs and exchanges, among others.

As an alternative to the approach taken in the final rules, the Commission has considered imposing specific requirements as to the form and manner of documentation. Specific documentation requirements could result in greater information gathering and documentation by SBS Entities fulfilling their status verification and "know your counterparty" obligations, which may further strengthen counterparty protections and reduce evasion. However, we recognize commenter concerns regarding costs and loss of flexibility from imposing specific documentation requirements, and the importance of private contractual negotiation, as well as the need to impose effective verification and documentation requirements to facilitate enforcement.[1660] We therefore declined to adopt this approach.

The Commission is adopting a "know your counterparty" requirement based on a policies and procedures approach. However, the final rules explicitly delineate certain items that the Commission believes are essential facts concerning the counterparty that are necessary for conducting business with such counterparty. The CFTC has adopted a substantially similar requirement for swap dealers to implement policies and procedures reasonably designed to obtain and retain a record of the essential facts about each known counterparty that are necessary for conducting business with such counterparty. As noted earlier, in light of extensive cross-market participation between swap and security-based swap markets, and expected cross-registration of SBS Entities already complying with CFTC's business conduct rules, harmonization with the CFTC regime may facilitate continued integration between these markets and may potentially reduce duplicative compliance costs for some dual registrants.

2. Disclosures and Communications

The Commission is adopting rules concerning SBS Entity disclosures of material risks, characteristics, incentives, conflicts of interest and daily mark of security-based swaps to their counterparties. The final rules also require SBS Entities to make a written record of the non-written disclosures and provide a written version of these disclosures to counterparties no later than the delivery of the trade acknowledgement for a particular transaction. We note that the scope of the final disclosure requirements is limited to counterparties that are not themselves SBS or Swap Entities, the economic effects of which are discussed below.

[1655] Initial outside counsel cost: $500 * (20 non-CFTC registered SBS Entities) = $10,000. Initial adherence letter burden: (In-house attorney at $380 per hour) × 20 hours = $7,600.

[1656] Initial cost: (In-house attorney at $380 per hour) × 250 hours = $95,000.

[1657] (In-house attorney at $380 per hour) × 11,500 hours = $4,370,000.

[1658] Initial costs of disclosure of essential facts: $500 × (3,468 counterparties) = $1,734,000. Initial costs of adherence letters: (In-house attorney at $380 per hour) × 3,468 counterparties = $1,317,840. Total initial costs: $1,734,000 + $1,317,840 = $3,051,840.

[1659] Initial cost: (In-house attorney at $380 per hour) × 109,000 hours = $41,420,000.

[1660] *See* FIA/ISDA/SIFMA, *supra* note 5; CFA, *supra* note 5.

Broadly, these disclosure rules may mitigate information asymmetries between more informed SBS Entities and less informed counterparties, and may allow them to make more informed decisions about capital allocation and counterparty selection. At the same time, SBS Entities profit from information rents[1661] and, to the extent that disclosures will inform their counterparties, SBS Entities may forgo profits on security-based swaps with counterparties as a result of these requirements. In addition, SBS Entities will incur direct compliance costs. As discussed in Section V and consistent with our analysis in the Proposing Release, compliance with disclosure rules will involve an initial cost burden of which has been estimated at approximately $25,080,000, with the ongoing burden estimated at $2,508,000 for all SBS Entities.[1662] Similarly, the Commission estimates that information technology infrastructure required to comply with final disclosure rules will require will cost approximately $124,520,000 initially, and an additional $62,260,000 per year for all SBS Entities.[1663] In addition, the Commission estimates that SBS Entities will incur costs of evaluating whether more particularized disclosures are necessary for each transaction and of developing the additional disclosures for an ongoing aggregate estimated cost of $121,124,000.[1664] These and other costs less amenable to quantification and discussed below may be passed on to counterparties.

These rules may enhance transparency and protect counterparties, but may also adversely affect the willingness of SBS Entities to intermediate OTC security-based swaps with non-SBS or Swap Entity counterparties, and the costs of entering OTC security-based swaps for non-SBS or Swap Entity counterparties may increase. This fundamental tradeoff is discussed in more detail in the sections below with respect to individual disclosure requirements, their scope and implementation. The overall economic effects of the final disclosure requirements will depend on the severity of informational asymmetries and conflicts of interest in security-based swap markets, the ability of some counterparties of SBS Entities to obtain similar information independently without the required disclosures and the costs of doing so,[1665] and the information content of the required disclosures, and the extent to which market participants have already learned from similar disclosures pertaining to swap transactions.

We note that the SBS Entities will not be required to comply with pre-transaction disclosure requirements if the identity of the counterparty is not known to the SBS Entity at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with these obligations.

a. Risks, Characteristics, and Conflicts of Interest

Rule 15Fh–3(b) requires SBS Entities to make disclosures concerning a security based swap's material risks and characteristics, and the SBS Entity's material incentives or conflicts of interest before entering into a security-based swap. In addition to implementing the statutory requirements, the rule also requires SBS Entities to make a written record of the non-written disclosures and provide a written version of these disclosures to counterparties in a timely manner, but no later than the delivery of the trade acknowledgement for a particular transaction.

In evaluating the economic effects of this rule, we note that security-based swaps are complex products, and security-based swap markets are more opaque than markets for regular equity or fixed income products. Security-based swap markets are characterized by a high degree of informational asymmetry among various groups of counterparties. As described in the economic baseline, dealers intermediate large volumes of security-based swaps, observe quote solicitations and order flow. In addition, SBS Dealers may serve in a variety of capacities such as placement agents, underwriters, structurers, securitizers, and lenders in relation to security-based swaps and the securities underlying them. Further, as outlined above, SBS Dealers generally have business incentives that may be competing with those of their counterparties as a result of taking on the opposite side of the transactions, and may have specific conflicts of interest due to their advisory, market making, trader and other roles. As discussed in Section VI.A, Major SBS Participants may also be better informed about the risks and valuations of security-based swaps due to their large positions in security-based swaps, compared with their non-SBS Entity counterparties.

At the same time, counterparties that are not SBS or Swap Entities do not observe quote solicitations or order flow, and are less likely to arrange or structure security-based swaps and their underlying securities. Such counterparties may also be generally less informed about the nature and risks of security-based swaps due to their low volume of activity, as indicated by the low transaction share of non-dealers in Table 1 of the economic baseline. Many non-dealer counterparties transact in security-based swaps through investment advisers; however approximately 7% transact in security-based swaps directly. If the required disclosures are informative to non-SBS Entities, these final rules may help less informed market participants make more informed counterparty and capital allocation choices. The records requirement may facilitate the implementation of the disclosure requirement, enabling counterparties to reference the non-written disclosures made prior to entering into the swap during the life of the security-based swap.

As we have recognized,[1666] informational asymmetry can negatively affect market participation and decrease the amount of trading—a problem commonly known as adverse selection.[1667] When information about security-based swap risks, liquidity, pricing and counterparty incentives is scarce, market participants may be less willing to enter into transactions and the overall level of trading may fall. To the extent that adverse selection costs are currently present in security-based swap markets, if market participants become better informed as a result of these final rules, they may increase their activity in security-based swaps, which may facilitate greater informational efficiency and liquidity in security-based swap markets. Disclosures may inform counterparties of SBS Entities about security-based swap markets, and counterparties may learn from repeatedly accessing these markets. Hence, most of the benefits are expected to be incurred by existing participants when the first disclosures are made, and by new market participants when they first enter the market. However, to the extent that disclosures will contain transaction-specific information concerning risks, incentives, pricing and clearing of individual security-based swaps, the informational benefits described above may persist.

[1661] Rents refer to profits that SBS Entities earn by trading with counterparties who are less informed. In a market with competitive access to information, there is no informational premium; SBS Entities only earn a liquidity premium. The difference between the competitive liquidity premium and the actual profits that SBS Entities earn is the economic rent. *See* Cross-Border Adopting Release, 79 FR 47283.

As the Commission articulated in other releases, transparency stemming from the SDR Rules and Regulation SBSR should reduce the informational advantage of SBS dealers and promote competition among SBS dealers and other market participants. *See* SDR Registration Release 80 FR at 14528, *supra* note 1202; Regulation SBSR Adopting Release, *supra* note 1602.

[1662] Initial cost: (In-house attorney at $380 per hour) × 66,000 hours = $25,080,000. Ongoing cost: (In-house attorney at $380 per hour) × 6,600 hours = $2,508,000.

[1663] Initial cost: (Compliance manager at $283 per hour) × 440,000 hours = $124,520,000. Ongoing cost: (Compliance manager at $283 per hour) × 220,000 hours = $62,260,000.

[1664] Ongoing cost: (Compliance manager at $283 per hour) × 428,000 hours = $121,124,000.

[1665] *See* Table 2 of the economic baseline, which shows the overwhelming majority of most groups of non-dealer market participants are represented by investment advisers in security-based swap transactions. *See also, e.g.,* MFA, *supra* note 5.

[1666] *See, e.g.,* Registration Adopting Release 80 FR at 49004, *supra* note 989.

[1667] *See* George A. Akerlof, *The Market For "Lemons": Quality Uncertainty and the Market Mechanism,* 84 Q.J. Econ. 488 (1970).

At the same time, disclosures required under these proposed rules will involve costs to SBS Entities and their counterparties. As discussed in Section V, SBS Entities will bear direct compliance burdens related to the disclosures, which are reflected in our compliance cost estimates above. In addition, since SBS Entities are more informed about security-based swaps, they are able to extract information rents in the form of higher markups and fees charged to non-dealer counterparties. If SBS Entity disclosures better inform counterparties concerning characteristics and risks of security-based swaps, these rules may reduce the informational advantage of SBS Entities relative to their counterparties and decrease profitability of transactions with non-SBS Entity counterparties, which may reduce incentives for dealers to provide liquidity to these counterparties.[1668]

We recognize that the above costs may be passed on to counterparties through more adverse price and non-price terms of security-based swaps. To the extent that SBS Entities may be unable to recover these costs, they may become less likely to intermediate transactions with non-SBS or Swap Entity counterparties and decrease participation in U.S. security-based swap markets. Further, since final business conduct rules require these disclosures to be made prior to entering into the security-based swap, the disclosure requirements may involve some delays in execution and may affect liquidity in security-based swaps, to the extent that these disclosures are not already being made in master agreements or post trade acknowledgements. We have considered how the timing, manner and content of disclosures may affect these competing considerations. First, we recognize that the ability to rely on master agreements, standardized disclosures and ex post trade acknowledgements of oral disclosures may significantly reduce ongoing transaction specific costs and potential execution delays, as recognized by a commenter,[1669] but may reduce the specificity and information content of disclosures. As the Commission discussed in the Proposing Release,[1670] security-based swaps are executed under master agreements and SBS Entities may elect to make required disclosures in a master agreement or accompanying standardized document. However, as stated in the Proposing Release and discussed in Section II, *supra*, standardized disclosures will not be sufficient in all circumstances and certain provisions may need to be tailored to the particular transaction, most notably pricing and other transaction-specific commercial terms.

We have considered commenter concerns that oral disclosures may not satisfy the goal of pre-trade transparency, may make enforcement more difficult, and may allow SBS Entities to obscure conflicts of interest and misrepresent risks until after trade confirmation.[1671] However, we are sensitive to the fact that alternative requirements to provide extensive written disclosures of risks, characteristics, incentives and conflicts of interest before an SBS Entity enters into a transaction with a counterparty may increase transaction costs or impose execution delays, which may be particularly significant in periods of high market volatility. We have received comments that a requirement to provide these disclosures "at a reasonably sufficient time" prior to entering the security-based swap transaction, in writing may better inform unsophisticated counterparties,[1672] however it may further raise the risks discussed above. These could result in potentially significant execution delays, decreases in liquidity and SBS Entity willingness to intermediate transactions with non-SBS or Swap Entity counterparties. We also note that, as proposed, under the final rules, standardized disclosure will not be sufficient in all circumstances: Some forms of disclosure may be highly standardized, but certain provisions will need to be tailored to reflect material characteristics of individual transactions, most notably pricing and other transaction-specific commercial terms. The CFTC's approach to manner and form of disclosures is substantially similar to the proposed requirements and to the rule being adopted. In the Proposing Release, the Commission interpreted the statutory requirement to disclose material risks and characteristics of the security-based swap itself, and not of the underlying reference security or index.[1673] As an alternative, the Commission could include underliers in the scope of required disclosures. Compared to the approach being adopted, the alternative may help better inform less sophisticated investors and enable them to make better tailored investment decisions. However, it may increase transactional costs and execution delays, which are particularly costly during times of high market volatility. Further, information about many underliers, such as corporate, municipal and sovereign bonds, is more likely to be publicly available.

We have received mixed comments on the relative balance of these competing considerations with respect to underlier disclosures.[1674] Under the CFTC's approach, disclosures regarding underlying assets are not generally required, but to the extent that payments or cash-flows of the swap are materially affected by the performance of an underlying asset for which publicly available information is not available, the Swap Entity is required to provide disclosure about the material risks and characteristics of the underlying asset to enable the counterparty to assess the material risks of the swap. As described in Section II, our final rules require disclosure regarding the referenced security, index, asset or issuer if it would be considered material to investors in evaluating the security-based swap, including any related payments.

[1668] For instance, Grossman and Stiglitz (1980) showed that because information is costly, prices cannot perfectly reflect the information which is available, since if it did, those who spent resources to obtain it would receive no compensation. In other words, informational efficiency reduces incentives of economic agents to expend resources to acquire information, and there is an equilibrium amount of "disequilibrium". *See* Sanford J. Grossman and Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets,* 70 American Economic Review 393–408 (1980).

[1669] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1670] *See* Proposing Release, 76 FR at 42406, *supra* note 3.

[1671] *See* CFA, *supra* note 5.

[1672] *See* Better Markets (August 2011), *supra* note 5 and CFA, *supra* note 5.

[1673] *See* Proposing Release, 76 FR at 42407, *supra* note 3.

[1674] *See, e.g.,* Better Markets (2011) Letter; SIFMA (2011) Letter; FIA/ISDA/SIFMA *supra* note 5; Levin, *supra* note 5; Markit, *supra* note 5; Barnard, *supra* note 5; CFA, *supra* note 5. Also *see* Section II.G.2 *supra.*

Finally, we have considered the alternatives of adopting more prescriptive requirements of characteristics to be disclosed, an explicit risk taxonomy, requirements concerning volatility and liquidity metrics, and scenario analysis regarding political, economic events and underlying market factors. These approaches also present a tradeoff between informing investors and protecting counterparties, and costs and willingness of SBS Entities to intermediate trades with non-SBS or Swap Entity counterparties, similar to the effects described above.

For instance, disclosure of a scenario analysis may inform counterparties, but may be particularly costly since such analysis may depend on the specific terms of the agreement. To the extent that the provision of scenario analysis will impose costs on SBS Entities, a requirement to include scenario analysis as part of mandated disclosures may result in bundling research and advice, with SBS intermediation functions for all affected transactions. This would increase costs to SBS Entities, and these costs are likely to be passed on to counterparties. Further, one commenter suggested that the requirement to produce and disclose scenario analysis for each transaction may delay execution and expose counterparties to market risk in times of market volatility.[1675]

As an alternative, the CFTC's approach allows counterparties to opt in to receive the scenario analysis for swaps that are not available for trading on a SEF, and requires Swap Dealers to disclose to counterparties their right to receive the scenario analysis. The CFTC's external business conduct rules do not prescribe whether and how swap dealers may be able to charge for such analysis and we do not have data regarding whether any counterparties are taking advantage of the rule provision. We understand that counterparties already privately negotiate terms of over-the-counter derivatives with SBS Dealers, which may also serve in advisory and other capacities. As discussed in the economic baseline, non-dealer market participants are typically institutional investors, the overwhelming majority of which rely on investment advisers in their security-based swap activities. It is unclear that a requirement to disclose the right to receive a scenario analysis would affect the demand for such analyses or inform counterparties.

The Commission has also considered an alternative of adopting prescriptive risk taxonomies, and requiring disclosure of volatility and liquidity metrics. While these requirements may reveal additional information to counterparties, they may be less informative for customized over-the counter security-based swaps, may fail to capture risks of new products, and would increase costs. To the extent that these requirements would increase SBS Entity costs of transacting with non-SBS or Swap Entity counterparties, these costs would also adversely affect terms of security-based swaps for non-SBS or Swap Entity counterparties. Rule 15Fh–3(b)(2) also requires SBS Entities to disclose any material incentives or conflicts of interest that an SBS Entity may have in connection with the security swap, including any compensation or other incentives from any source other than the counterparty. As articulated in Section II, this rule will not require SBS Entities to report all profits or expected returns from the swap or related hedging or trading activities, but will require reporting of incentives, such as revenue sharing arrangements, from any source other than the counterparty in connection with the swap. To the extent that disclosure informs counterparties regarding SBS Entity conflicts of interest, counterparties of SBS Entities may become better able to make informed decisions about security-based swaps and the SBS Entities they transact with. When SBS Entity conflicts of interest are severe, disclosure of such conflicts may lead counterparties to renegotiate the terms of a transaction or select another counterparty with fewer conflicts of interest, contributing to more efficient capital allocation by non-dealer counterparties. Importantly, this requirement does not prohibit material conflicts of interest. Instead, the rule focuses on disclosure of material incentives and conflicts of interest, which may help counterparties better evaluate the terms and risks of transacting with an SBS Entity. The severity of these conflicts of interest in security-based swaps, the awareness of non-SBS or Swap Entity counterparties about these conflicts, the similarity between disclosures of conflicts already made by SBS Entities cross-registered as Swap Entities under CFTC rules with disclosures that will be made under these final rules, and the informativeness of the newly required disclosures will influence the magnitude of the benefits described above.

We recognize that final external business conduct rules for Swap Entities are already in place and include a similar set of conflict of interest disclosure rules. Swap Entities are already disclosing incentives and conflicts of interest in swap transactions, which enters into our economic baseline and is reflected in current market activity. Non-SBS or Swap Entity counterparties that are transacting with the same dealers in both swap and security-based swap markets have benefited from such disclosures in swap markets, and may have already become familiar with standardized disclosures by Swap Dealer counterparties. To the extent that disclosures by the same dealers related to, for instance, index CDS and single name CDS may be similar, such counterparties may enjoy fewer benefits of these final rules. However, we note that the rules being adopted require disclosures specific to security-based swap transactions, and certain disclosures will need to be tailored to a particular security-based swap.

In addition to direct costs of compliance born by SBS Entities, to the extent that disclosures will provide new and relevant information about SBS Entity conflicts of interest, SBS Entities with significant conflicts of interest may lose business to SBS Entities that do not have such conflicts. While this requirement may impose costs on those SBS Entities with the most acute conflicts, such disclosures may benefit less conflicted SBS Entities, enhance protections of counterparties, and improve the ability of market participants to make informed counterparty decisions.

We have considered the costs and benefits of an alternative requiring a disclosure of the difference in compensation between selling a security-based swap versus another product with similar economic terms, or expected profit of the SBS Entity from the transaction, as suggested by some commenters.[1676] We do not believe that disclosure of SBS Entity profits to counterparties would protect counterparties or improve their ability to make suitable investment decisions, relative to the approach being adopted, and are not adopting this alternative. SBS Entities compete for business on price, execution quality, underlier and counterparty risks, among others. We understand that counterparties need information about price, non-price terms and risks of the security-based swap and conflicts of interest of the SBS Entity to be able to assess the relative merits of a particular transaction. The final business conduct rules being adopted will require SBS Entities to disclose to their non SBS Entity counterparties material characteristics and risks of the transaction, as well as any compensation or incentives from any source other than the counterparty in connection with the security-based swap. Rules 15Fh–3(c) and 15Fh–3(d), the economic effects of which are discussed below, will also require disclosure of the daily mark and clearing rights. We also note that SDR Rules and Regulation SBSR adopted by the Commission will introduce post-trade transparency to security-based markets, and counterparties will have access to more extensive and more accurate information upon which to make trading and valuation determinations when compliance with these rules is required.

[1675] *See* SIFMA (August 2011), supra note 5.

[1676] *See* CFA, *supra* note 5; Levin, *supra* note 5.

SBS Entities are for-profit entities, buying security-based swaps from counterparties seeking to sell them; and selling swaps to counterparties seeking to purchase them. When SBS Entities carry balance sheet risk, they profit from directional price moves that result in losses for their counterparties and so, they may have an incentive to offload security-based swaps in their inventory on less informed non-dealer counterparties, even where such security-based swaps are unsuitable. When SBS Entities hedge their inventory risk and do not carry balance sheet exposure, they benefit from charging higher costs and fees to their counterparties. SBS Entity business incentives may, therefore, be generally competing with the interests or positions of their counterparties. However, SBS Entities have reputational incentives and benefit from intermediating a greater volume of trade which, all else given, mitigates this conflict. Further, it is unclear that market participants are generally unaware of these competing incentives.

SBS Entities act as principal risk holders and transacting agents effecting security-based swaps on behalf of their customers. An SBS Entity's expected return on a security-based swap depends on, among others, price terms of the swap, cost of funds, shorting constraints, balance sheet exposures, costs of underlying elements of the security-based swap, and costs of structuring the security-based swap. It is unclear that disclosure of expected profits of an SBS Entity has any bearing on a counterparty's expected cost of the transaction, quality of execution or assessment of the risks of a security-based swap given the counterparty's investment objectives, horizons, hedging needs, financial condition etc.[1677] As a practical consideration, the SBS Entity's expected profit would depend on potentially proprietary data and valuation models, and numerous assumptions about future market factors. At the same time, such a requirement would impose direct costs of producing disclosures and potential reputational costs on SBS Entities; if the costs become significant, some SBS Entities may reduce security-based swap market activity with non-SBS or Swap Entity counterparties. We note that the rules being adopted not only require disclosure of material characteristics, risks, conflicts of interest or incentives, daily mark and clearing rights, but also include fair and balanced communications, antifraud, supervision, compliance, and conduct requirements.

b. Daily Mark

Rule 15Fh–3(c) requires SBS Entities to disclose the daily mark to counterparties other than SBS or Swap Entities upon request. For cleared security-based swaps, the rules require an SBS Entity to disclose, upon request of the counterparty, the daily mark that the SBS Entity receives from the appropriate clearing agency. For uncleared swaps, Rule 15Fh–3(c) implements the statutory provision and requires the SBS Entity make this disclosure on a daily basis for any uncleared security-based swap by providing the midpoint between the bid and offer, or the calculated equivalent thereof, as of the close of business unless the parties agree in writing otherwise. The method for computing the daily mark is not provided in the statute. For uncleared swaps, the SBS Entity would also be able to use market quotations for comparable security-based swaps and model implied valuations. The SBS Entity is also required to disclose data sources, methodologies and assumptions used to prepare the daily mark, and promptly disclose any material changes to the above during the term of the security-based swap.

Similar to the economic effects of disclosures concerning material risks and characteristics of security-based swaps, the overall impact of the daily mark disclosure depends on the severity of the informational asymmetries between SBS Entities and counterparties regarding market prices of security-based swaps; the amount of disclosure unsophisticated counterparties require to become better informed; the informativeness of the disclosures; and the direct and indirect costs of producing such disclosures by SBS Entities. For cleared security-based swaps, the requirement to disclose the daily mark from clearing agencies is an explicit statutory requirement, and provides a standardized and comparable reference point for counterparties.[1678] As described above, based on the current model for clearing security-based swaps, the security-based swap between the SBS Entity and counterparty is terminated upon novation by the clearing agency. The SBS Entity would no longer have any obligation to provide a daily mark to the original counterparty because a security-based swap no longer exists between them. Therefore, there would not be any ongoing burden on the SBS Entity.

The ability of SBS Entities to rely on quotes, model imputed prices or prices of comparable security-based swaps to calculate the daily mark for uncleared swaps may produce valuations that are potentially superior to stale market prices on illiquid contracts. However, we continue to recognize that SBS Entities may influence the daily mark disclosed to their less sophisticated counterparties by varying modeling assumptions, data sources and methodology which produce the daily mark, as supported by some commenters.[1679] This tradeoff is partially mitigated by the requirement to disclose data sources and a description of the methodology and assumptions used to prepare the daily mark, and promptly disclose any material changes during the term of the swap.

As we recognized in the Proposing Release,[1680] we anticipate significant variability in the models and data sources, methodology and assumptions used by different SBS Entities, leading to different daily marks being established for similar security-based swaps. As a result, security-based swap market participants that consider the daily mark as an indicator in the reporting of their positions may report different valuations of similar security-based swap positions. However, we continue to believe that since, as quantified in the economic baseline, non-dealer counterparties typically transact with multiple dealers, counterparties may be able to observe and analyze differences in security-based swap valuations across SBS Entities. We recognize that the daily mark may not be a reliable reference point for estimating fair values, potential net asset values or prices at which the security-based swap could be executed as suggested by a commenter,[1681] however, we continue to believe that it may inform counterparty understanding of their financial relationship with SBS Entities.[1682]

[1677] For instance, one commenter asserted that the best protection for a counterparty is reviewing and selecting the best available pricing. *See* FIA/ISDA/SIFMA, *supra* note 5.

[1678] We have received comment that SBS Entities may have direct or indirect affiliations or relationships with clearing agencies and market data providers, which may pose conflicts of interest. *See* Levin, *supra* note 5. Should such conflicts exist, they may be partly mitigated by other substantive business conduct requirements being adopted, such as the antifraud provision, requirement to engage in fair and balanced communications, and other statutory obligations. Further, counterparties will be able to select the venue in which security-based swaps will be cleared and will benefit from SBS Entities' disclosures of incentives and conflicts of interest under these final rules.

[1679] *See, e.g.,* Levin, *supra* note 5; IDC, *supra* note 5.

[1680] *See* Proposing Release, 76 FR at 42449, *supra* note 3. Also *see, e.g.,* FIA/ISDA/SIFMA, *supra* note 5.

We are sensitive to cost considerations, and recognize that costs borne by SBS Entities as a result of the final business conduct rules may be passed on to counterparties in the form of higher transaction costs. Further, if these costs are significant, SBS Entities may reduce their security-based swap activity or become less willing to intermediate swaps with certain groups of counterparties. As a result, liquidity, price discovery and market access of certain groups of counterparties may be adversely affected. As articulated in the Proposing Release, we understand that SBS Entities routinely assess end-of-day values in the course of their business as an integral component of risk management. We continue to believe that SBS Entities may already be estimating values that may be used to fulfil the daily mark disclosure requirement, and, therefore, to the extent this is the case, direct compliance costs of this requirement to costs of producing disclosures may be less than estimated above.

One commenter indicated that requiring Major SBS Participants to comply with the daily mark requirement for uncleared swaps would result in "significant, unnecessary increased costs without any meaningful benefit." [1683] We recognize that the broader scope of this requirement will impose costs on Major SBS Participants, as reflected in our compliance cost estimates. To the extent that Major SBS Participants may be better informed about the risks and valuations of security-based swaps and more sensitive to market risk due to their significant positions, disclosures of the daily mark may help their non SBS Entity counterparties make more informed counterparty and valuation determinations. We note that the rules being adopted provide all SBS Entities significant flexibility with respect to how they may estimate the daily mark for uncleared swaps. Specifically, similar to SBS Dealers, Major SBS Participants will be able to rely on market quotes for similar swaps, model based prices or some combination thereof under Rule 15Fh–3(c). The Commission continues to believe that informing counterparties' understanding of their financial relationship with SBS Entities is an important benefit of these final rules.

As discussed in Section II, *supra*, SBS Entities will not necessarily be able to use the same mark for collateral purposes and for meeting the disclosure requirement. We recognize commenter concern that this approach may impose additional costs of estimating and disclosing a daily mark valuation on SBS Entities with respect to transactions where both counterparties have agreed on a basis for margining uncleared swaps.[1684] As discussed above, the Commission continues to believe that the daily mark disclosure, as being adopted for the purposes of this rule, would provide a useful and meaningful reference point for counterparties holding positions in uncleared security-based swaps.

Currently, entities that are likely to trigger SBS Entity registration requirements due to their volume of dealing activity are not required to disclose daily marks of security-based swaps, or data sources, assumptions and methodologies used to calculate them. While this requirement is currently effective in swap markets and some SBS Entities may be making such security-based swap specific disclosures voluntarily, these final rules impose mandatory disclosure requirements on all SBS Entities in their security-based swap transactions with counterparties that are not themselves SBS Entities or Swap Entities. The requirement to disclose data sources, assumptions and methodology used to calculate the value of security-based swaps may reduce the informational advantage SBS Entities enjoy as a result of developing superior valuation models or information, as supported by public comments.[1685] However, these costs are partly mitigated by the ability to rely on standardized disclosures and a description of the models, as opposed to disclosures of the models themselves.

c. Clearing Rights

Finally, Rule 15Fh–3(d) requires SBS Entities to make disclosures regarding clearing rights to counterparties that are not SBS Entities or Swap Entities before entering into the security-based swap. For security-based swaps not subject to mandatory clearing, the SBS Entity would be required to determine whether the security-based swap is accepted for clearing by one or more clearing agencies, to disclose the names of clearing agencies that accept the security-based swap for clearing, and to notify the counterparty of their right to elect clearing and the agency used to clear the transaction. For security-based swaps subject to mandatory clearing, the final rules require SBS Entities to disclose clearing agency names to the counterparty, and to notify the counterparty of their right to select the clearing agency subject to Section 3C(g)(5) of the Act. The rule also requires SBS Entities to make a written record of the non-written disclosures and provide counterparties with a written version of these disclosures no later than the delivery of the trade acknowledgement of the transaction.

The required disclosure of clearing rights may increase how informed a counterparty is concerning the availability of clearing in general, the ability to require clearing of security-based swaps, as well as the names of clearing agencies that may accept a given security-based swap for clearing. The reliance on standardized disclosures may lead to more general and less transaction specific information being communicated, reflecting information that has already been absorbed by market participants and potentially reducing these benefits. To the extent that the rule results in greater transparency concerning clearing rights, the volume of cleared security-based swaps may increase.

We note that clearing is currently voluntary and available for CDS only.[1686] Disclosure of the clearing agencies that accept a security-based swap for clearing may inform counterparties of the right to clear and of various clearing agencies that are able to clear a given security-based swap, particularly clearing agencies that have just started accepting a given security-based swap or group of security-based swaps for clearing. This may enhance potential competition among clearing agencies in the future, which may lower clearing costs or improve quality of clearing services. The above effect may be more significant if more clearing agencies register to clear security-based swaps and clearing becomes available for security-based swaps other than CDS, which are currently being cleared voluntarily.

[1681] *See* MFA, *supra* note 5.

[1682] *See* Proposing Release, 76 FR at 42449, *supra* note 3.

[1683] *See* MFA, *supra* note 5.

[1684] *See* FIA/ISDA/SIFMA, *supra* note 5.

[1685] *See, e.g.,* MFA, *supra* note 5; IDC, *supra* note 5.

[1686] Mandatory clearing is not currently in effect and we currently do not have sufficient information to estimate the number and volume of security-based swap transactions executed across different trading venues and using these various execution practices. However, the Commission staff has performed an analysis of voluntary clearing activity in single name CDS markets, which generally informs our analysis. *See* SEC Division of Economic and Risk Analysis, Single-Name Corporate Credit Default Swaps: Background Data Analysis on Voluntary Clearing Activity, 15 (Apr. 2015), available at *http://www.sec.gov/dera/staff-papers/white-papers/voluntary-clearing-activity.pdf.*

Currently, SBS Entities are not yet required to register and are not subject to substantive Title VII requirements, including business conduct rules. Therefore, SBS Entities currently are not required to produce disclosures concerning clearing rights and a list of clearing agencies accepting a security-based swap for clearing. Entities that are currently registered with the CFTC as Swap Entities are required to make clearing rights disclosures for swap transactions. Under these final rules, all SBS Entities will bear costs of producing the clearing rights disclosures pertaining to security-based swap transactions, and communicating them to their counterparties other than SBS Entities and Swap Entities, as estimated in Sections V and VI.C above. However, we recognize that these costs may be lower for dually registered SBS Entities that may have already adjusted their systems and practices to comply with parallel CFTC rules. We also recognize that if, as a result of the disclosure, some counterparties begin choosing to clear as well as choosing the agency used to clear the transaction, SBS Entities may lose potentially beneficial flexibility related to clearing, which may affect the price of security-based swaps. In addition, if clearing rights disclosures lead to a greater volume of transactions cleared through registered clearing agencies, increases in clearing costs borne by SBS Entities may be passed on to counterparties.

3. Suitability

SBS Dealers intermediate large volumes of security-based swaps, buying products from counterparties seeking to sell them; and selling swaps to counterparties seeking to purchase them. When SBS Dealer exposure is not hedged by offsetting transactions with other dealers, SBS Dealers act as principal risk holders, benefiting from directional price moves that result in losses for their counterparties, and vice versa. SBS Dealers carrying inventory may have an incentive to recommend security-based swaps from their inventory that may be unsuitable to their counterparties, but help to manage dealer inventory risk. When SBS Dealers hedge the underlying risk of a transaction, dealer profits stem from commissions and fees charged to their counterparties in relation to the security-based swap. As a result, SBS Dealer incentives may be generally inconsistent with, or may be contrary to the economic interests of their counterparties.

As discussed in earlier sections, SBS Dealers are more informed than their non-dealer counterparties as they can directly observe pre-trade requests for quotes and order flow. Where SBS Dealers have previously acted in other capacities, such as in the capacity of an underwriter, arranger or structurer of a security-based swap, they may have superior information about the quality and risk of a specific security-based swap and its underlying assets. As a result, SBS Dealers may have superior information about the inherent value and risk of security-based swaps, including information concerning whether a given security-based swap is unsuitable for a particular non-dealer counterparty given the counterparty's horizon and ability to absorb losses, among other things.

When SBS Dealers advise their counterparties regarding security-based swaps, the above conflicts of interest may result in recommendations of security-based swaps that may be unsuitable for a given counterparty. For instance, more complex security-based swaps are more opaque and difficult to price for less informed counterparties; they may also be unsuitable for a greater number of non-dealer counterparties.[1687] At the same time, such transactions may be profitable for the dealer. To the extent that SBS Dealers may be recommending unsuitable security-based swaps, and to the extent counterparties may be relying on such advice and are unable to observe and decouple bias from the information component of the recommendation, counterparties may be entering into security-based transactions inconsistent with their investment objectives and risk tolerance. The central role and high market share of a small number of SBS Dealers described in the economic baseline may reduce the effectiveness of reputational considerations in mitigating these effects.

Under Rule 15Fh–3(f)(1), SBS Dealers recommending security-based swaps or trading strategies involving a security-based swap to counterparties other than an SBS Entity or a Swap Entity are required to (i) undertake reasonable diligence to understand potential risks and rewards associated with the recommendation; and, (ii) have a reasonable basis to believe that the recommended swap or strategy is suitable for the counterparty, taking into account, among other things, the counterparty's investment profile, trading objectives and ability to absorb potential losses. Rule 15Fh–3(f)(2) includes an alternative for institutional counterparties (defined as a counterparty that is an eligible contract participant as defined in clauses (A)(i), (ii), (iii), (iv), (viii), (ix) or (x), or clause (B)(ii) of Section 1a(18) of the Commodity Exchange Act and the rules and regulations thereunder, or any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million) that allows an SBS Dealer to satisfy its customer-specific suitability obligations in Rule 15Fh–3(f)(1)(ii) if (i) the SBS Dealer reasonably determines that the counterparty or agent with delegated authority is capable of independently evaluating investment risks with respect to a given security-based swap or strategy; (ii) the counterparty or agent represents in writing that they are exercising independent judgment in evaluating the dealer's recommendations; and (iii) the SBS Dealer discloses that it is acting as a counterparty and not assessing suitability. Under Rule 15Fh–3(f)(3), an SBS Dealer will be deemed to have satisfied the requirements of the first prong of the institutional suitability alternative in Rule 15Fh–3(f)(2)(i) if it receives written representations that: (i) In the case of a counterparty that is not a special entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; and (ii) in the case of a counterparty that is a special entity, satisfy the terms of the safe harbor in Rule 15Fh–5(b).

a. Costs and Benefits

Rule 15Fh–3(f)(1) may benefit counterparties by requiring that SBS Dealers undertake reasonable diligence to understand the potential risk and rewards associated with recommended security-based swaps or trading strategies involving security-based swaps and that these recommendations are suitable for the counterparty given the counterparty's investment profile, trading objectives, and ability to absorb potential losses. As a result, counterparties of SBS Dealers may become more likely to allocate capital to suitable security-based swaps, potentially enhancing counterparty protections and allocative efficiency.[1688] These benefits are expected to accrue only to the extent that some SBS Dealers otherwise may be making unsuitable recommendations, and to the extent that non-SBS or Swap Entity counterparties rely on such SBS Dealer recommendations in their capital allocation decisions. If incentive conflicts or governance failures within counterparties, or other factors unrelated to SBS Dealer recommendations, for instance, reaching for yield in low interest rate environments, contribute to potentially unsuitable security-based swap choices, the benefits of these rules may be muted. The suitability standard does not require dealers to disclose whether another suitable security-based swap or underlier has superior material characteristics. Therefore, some of the above counterparty protection and allocative efficiency benefits of the suitability standard may be less. Further, this benefit is likely to be highest for those counterparties of SBS Dealers which do not already rely on professional asset managers or independent advisers in security-based swap transactions.

[1687] The Commission recognizes that complex over-the-counter security-based swaps may benefit some market participants due to the ability to tailor economic terms to counterparties' hedging needs or market views.

The suitability requirement will impose costs on SBS Dealers. First, the rule requires SBS Dealers to undertake reasonable diligence to understand the potential risks and rewards of the security-based swaps or trading strategy involving a security-based swap they recommend. Second, the rule will involve direct costs required to make an assessment of suitability of a security-based swap or asset class for each counterparty.[1689] As estimated in Section V, we expect that SBS Dealers may seek to obtain representations at an estimated cost of up to $11,393,160.[1690] Further, the Commission recognizes that suitability assessments under these final rules may give rise to potential liability and litigation costs of SBS Dealers.

In considering the economic effects of this final rule, we note that the suitability requirement does not apply to recommendations made to SBS Dealers, Major SBS Participants, Swap Dealers, or Major Swap Participants. Therefore, the rule may result in higher costs to SBS Dealers in transacting with non-SBS or Swap Entity counterparties. Additionally, costs of suitability assessments may be higher for counterparties with which an SBS Dealer has had no prior transactions.

The rule may adversely affect counterparties of SBS Dealers that are not themselves SBS Dealers, Major SBS Participants, Swap Dealers, or Major Swap Participants. In addition, SBS Dealer cost increases due to suitability assessments discussed above may be passed on to counterparties, and, if a significant percentage of the costs cannot be recovered, the willingness of SBS Dealers to make recommendations to non-dealer counterparties may decrease. Further, SBS Dealers may have superior information about the quality of security-based swaps they intermediate, but have significantly less information about their counterparty. This informational asymmetry may result in SBS Dealers not recommending security-based swaps that may be potentially suitable to the counterparty. Moreover, to the extent that customer suitability evaluations take time and require additional due diligence, the rule may result in execution delays, particularly during times of high market volatility when the value of risk mitigation may be higher. We note, however, that suitability requirements apply only with respect to swaps being recommended by SBS Dealers, and counterparties may continue to have access to security-based swaps intermediated without bundled SBS Dealer advice, as well as swaps executed on SEFs or registered exchanges.

The above benefits and costs of the suitability rule are likely to be limited by the scope of these final rules and the institutional suitability alternative. The suitability requirement is limited to transactions between SBS Dealers and counterparties that are not themselves SBS or Swap Entities. We believe that SBS Entities are likely to be able to independently evaluate material risks, pricing, and overall suitability of a security-based swap given, among others, their investment objectives and risk tolerance. As shown in Figure 3, the majority of trades and trade notional involved trades among dealers, which substantially reduces the scope of application of the suitability requirement. Further, as discussed below, the scope of application of the suitability rule may be reduced if SBS Dealers are able to take advantage of the institutional suitability alternative for customer-specific suitability with respect to a significant fraction of transactions.

As noted in the proposing release,[1691] many SBS Dealers may already have an obligation to make suitable recommendations in other contexts. FINRA imposes a suitability requirement on recommendations by broker-dealers and we have elsewhere estimated that up to 16 entities registering with the Commission as SBS Entities may be already operating as registered broker-dealers subject to Commission and FINRA oversight.[1692] As discussed in Section II, Swap Dealers registered with the CFTC are also subject to reasonable basis and customer-specific suitability requirements with respect to swap transactions under Rule 23.434, and we have elsewhere estimated that up to 35 SBS Entities may be cross-registered with the CFTC as Swap Entities. Some of these cross-registered entities may have adjusted their compliance infrastructure and recommendation practices. These considerations may mitigate both the costs and the benefits of these final rules.

b. Institutional Suitability Alternative

Rule 15Fh–3(f)(2) includes an institutional suitability alternative for customer-specific suitability assessments. SBS Dealers will be deemed to have fulfilled their customer-specific suitability obligations if they reasonably determine that the counterparty or its agent is capable of independently evaluating the investment risks; the counterparty or agent affirmatively represents in writing that they are evaluating the investment independently; and the SBS Dealer discloses that it is not undertaking to assess suitability for the counterparty. The institutional suitability alternative for customer-specific suitability requirements will not be available with respect to counterparties that are not institutional counterparties (defined as a counterparty that is an eligible contract participant as defined in clauses (A)(i), (ii), (iii), (iv), (viii), (ix) or (x), or clause (B)(ii) of Section 1a(18) of the Commodity Exchange Act and the rules and regulations thereunder, or any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. Recommendations of any potentially unsuitable products could involve losses and lead to inefficient capital allocation by non-dealer counterparties when such counterparties lack the ability to independently assess suitability of security-based swap transactions they enter into. Sophisticated institutions or entities that rely on independent advisors in their decision making may be better able to independently assess the merits and suitability of a given security-based swap. Therefore, more sophisticated counterparties and counterparties that rely on independent advisers to assess disclosures and analyze the relative merits of individual swaps are less likely to benefit from the suitability rule. The institutional suitability alternative reflects these considerations.

[1688] *See, e.g.,* CFA, *supra* note 5; Levin, *supra* note 5.

[1689] *See, e.g.,* FIA/ISDA/SIFMA, *supra* note 5.

[1690] Initial cost: (In-house attorney at $380 per hour) × (6,271 × 2 hours for participants active in both swaps and SBS markets + 3,488 × 5 hours for participants active in SBS markets only) = 380 × 29,982 = $11,393,160.

[1691] *See* Proposing Release, 76 FR at 42450, *supra* note 3.

[1692] *See* Registration Adopting Release, 80 FR at 49000, *supra* note 989.

As a result of the institutional suitability alternative, SBS Dealers will not be required to undertake customer-specific suitability evaluations for counterparties that the rule presumes are capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy involving a security-based swap. As shown in Table 2 of the economic baseline, between November 2006 and December 2014, 99% of private funds, 100% of registered investment companies, 72% of insurance companies, 75% of non-financial firms and 98% of special entities were represented by investment advisers. Hence, non-dealer counterparties generally have third-party representation and may be able to evaluate security-based swaps independently of SBS Dealers. Many SBS Dealers may be able to rely on the institutional suitability alternative to fulfill their customer-specific suitability obligations. Therefore, a large fraction of transactions may qualify for the institutional suitability alternative, and the economic effects of the suitability requirement above may accrue to a small share of security-based swap market activity.

In addition, the institutional suitability alternative for customer-specific suitability will not be available for SBS Dealers making recommendations to counterparties that are not institutional counterparties. The $50 million asset threshold in the institutional counterparty definition narrows the scope of the alternative and increases the potential counterparty protection and allocative efficiency benefits of the final suitability rule. Our data do not allow us to estimate how many counterparties that would not meet the institutional counterparty definition are currently transacting in security-based swap markets and relying on recommendations by SBS Dealers, asset size thresholds for counterparties at which the intended information and counterparty protection benefits of these final rules become significant, or the extent to which asset size and counterparty sophistication may be correlated in security-based swap markets. We also recognize that the $50 million asset size threshold may increase costs and diverges from the suitability safe harbor adopted by the CFTC as part of business conduct standards for Swap Entities. As a result, all SBS Dealers that are dually registered with the CFTC as Swap Dealers will face a bifurcated suitability standard in swaps and security-based swaps, such as index CDS and single name CDS, with respect to counterparties that do not meet the institutional counterparty definition. In response to these final rules, dually registered SBS Dealers may choose not to rely on the institutional suitability alternative when making recommendations to counterparties that do not meet the institutional counterparty definition in both swap and security-based swap markets.

Direct burdens and costs of suitability assessments have been estimated above. The Commission also recognizes that this aspect of the institutional suitability alternative may increase system complexity, liability and other costs less amenable to quantification that SBS Dealers will incur as a result of advising and transacting with small counterparties in security-based swaps. These costs may be passed on to counterparties of SBS Dealers, which may experience an increase in transaction costs, decreased access to SBS Dealer advice, or decreased willingness of SBS Dealers to intermediate over-the-counter security-based swaps.

However, affected counterparties may continue to retain access to anonymous SEF or exchange executed security-based swaps, which are not subject to the suitability requirements of these final rules. Further, while the asset threshold in the institutional suitability alternative diverges from the CFTC's approach to suitability for Swap Dealers, it aligns with FINRA's asset threshold for the institutional account definition. SBS Dealers cross-registered as broker-dealers are currently unable to rely on institutional suitability when recommending less complex products, such as vanilla equity or fixed income instruments, to the same group of counterparties, and may be less affected by the institutional counterparty asset threshold for the suitability alternative. We note that SBS Dealers will be able to avail themselves of the institutional suitability alternative when making recommendations to certain financial institutions, insurance companies, registered investment companies, commodity pools with at least $5 million in assets, broker-dealers, futures commission merchants, floor brokers, investment advisers and commodity trading advisors with less than $50 million in assets. As discussed above, the Commission believes that the $50 million asset threshold may enhance counterparty protection and allocative efficiency benefits of the final suitability rule relative to the alternative of not including an asset threshold as part of institutional suitability.

We note that the institutional suitability alternative is not applicable to the suitability requirement to undertake reasonable diligence to understand the potential risks and rewards associated with the recommended security-based swap or trading strategy involving a security-based swap. However, when SBS Dealers rely on the alternative, they will not be required to make customer-specific suitability assessments with respect to individual counterparties' investment profile, trading objectives and ability to absorb losses.

As clarified in Section II, the Commission believes that parties should be able to make the disclosures and representations required by Rules 15Fh–3(f)(2) and (3) on a transaction-by-transaction basis, on an asset-class-by-asset-class basis, or in terms of all potential transactions between the parties. As a result, SBS Dealers will not be required to assess customer-specific suitability of whole asset classes or all security-based swaps, if the counterparty makes appropriate representations and other institutional suitability requirements are met.

To the extent that security-based swaps are heterogeneous in their risk and expected return characteristics, and since the degree of counterparty sophistication and familiarity with various types of security-based swaps may vary over time, such an approach to institutional suitability may lower the benefits of the rule. However, the ability to take advantage of the institutional suitability alternative for groups of security-based swaps, asset classes or counterparties as a whole mitigates the burdens imposed on SBS Dealers,[1693] particularly when such dealers intermediate multiple homogeneous transactions with the same counterparty over a limited time period. For instance, as we have noted in the economic baseline, based on an analysis of DTCC–TIW data, an average unique dealer-nondealer pair entered into approximately 32 transactions in 2014. The ability of dealers to rely on the institutional suitability alternative for some or all of the trades with a given counterparty would be less costly, and may also limit execution delays facilitating market access to security-based swaps.

[1693] *See, e.g.,* Barnard, *supra* note 5.

In addition to the above considerations concerning institutional suitability, we note that the final suitability requirements will not apply if an SBS Dealer does not recommend a security-based swap or trading strategy involving a security-based swap to counterparties. As estimated above, the suitability requirement imposes costs on SBS Dealers, and may decrease their willingness to recommend security-based swaps to non-SBS or Swap Entity counterparties. However, as discussed throughout the release, we believe that the overwhelming majority of market participants already have access to third party advice concerning security-based swaps.

Finally, suitability obligations will also apply to transactions with special entities, and the institutional suitability alternative described above will be available for special entity counterparties that meet the institutional counterparty definition (*i.e.,* have total assets of at least $50 million).

4. Special Entities

The business conduct rules being adopted include a number of requirements for SBS Entities specific to their dealings with special entities governing, among other things: (a) The scope of entities that will be subject to the substantive special entity standards; (b) the duty to verify and inform entities when they are eligible to elect not to be considered a special entity for the purposes of these rules; (c) the definition of qualified independent representative for such purposes; (d) the conduct of SBS Entities when they act as counterparties to special entities; (e) the conduct of SBS Dealers when they act as advisors to special entities.

a. Scope and Verification

First, as part of verification of status requirement under Rule 15Fh–3(a)(2), SBS Entities will be required to verify whether a counterparty is a special entity before entering into a security-based swap, unless the transaction is executed on a registered or exempt SEF or registered national securities exchange, and the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the rule. Under Rule 15Fh–3(a)(3), an SBS Entity shall also verify whether a counterparty is eligible to elect not to be a special entity, and, if so, notify such counterparty of its right to make such an election. Rule 15Fh–2(e) defines the scope of special entities to include, among other things, federal and state agencies, States, cities, counties, municipalities, and other political subdivisions of a State, instrumentalities, departments or corporations of or established by a State or political subdivision of a State, employee benefit plans subject to Title I of ERISA, governmental plans as defined in Section 3(32) of ERISA, and endowments. Rule 15Fh–2(e) also provides that employee benefit plans defined in Section 3 of ERISA, that are not otherwise defined as special entities, may elect not to be treated as special entities by notifying an SBS Entity prior to entering into a security-based swap.

These final rules define the set of special entities that will be able to avail themselves of the protections in these final rules. The inclusion of entities defined in, but not subject to, ERISA into the special entity category, subject to an opt out provision, increases the set of market participants afforded the counterparty protections under the final business conduct standards, relative to the exclusive application of these rules to entities subject to ERISA.[1694] At the same time, as discussed below, compliance with these final rules concerning special entities will entail direct and indirect costs for SBS Entities. Increased costs to SBS Entities may be passed on to special entity counterparties in the form of more adverse terms of available security-based swaps or a decreased willingness of SBS Entities to intermediate such swaps with special entities, which may reduce special entities' access to such security-based swaps.[1695] The ability of special entities defined in, but not subject to, ERISA to opt out of the special entity status may give such entities greater flexibility in structuring their relationships with SBS Entities, and allow them to trade off the benefits of counterparty protections in these final rules against potentially greater costs and lower liquidity in SBS Entity intermediated OTC security-based swaps.

We note that the opt out approach for special entities defined in, but not subject to, ERISA differs from parallel CFTC business conduct rules, which allow such entities to opt into the special entity status instead. As discussed in the economic baseline, the Commission expects extensive cross-registration of SBS Entities as Swap Entities, and understands most market participants transact in both swap and security-based swap markets. To the extent that SBS Entities have significant bargaining power in transactions with special entities, special entities that have selected not to opt into the special entity status in swap markets are likely to opt out of similar protections under these final rules. Therefore, it is unclear whether the ability of special entities defined in, but not subject to ERISA to opt out of special entity protections would lead to a greater number of special entities benefiting from counterparty protections in these final rules, relative to the opt in approach. We also recognize that under the final rules, if a special entity chooses to opt out of the special entity status, it would be required to provide a written notice to the SBS Entity and would bear related costs. The overall economic effects of this rule will, therefore, depend on the number of entities defined in, but not subject to, ERISA that will choose to opt out of the special entity status, the costs of producing notices, and magnitude of the transaction cost increases in OTC security-based swaps resulting from compliance with these final special entity rules.

Estimates of special entity market participants in our economic baseline are based on manual account classifications, and our data is not sufficiently granular to estimate the number of special entities defined in but not subject to ERISA currently active in security-based swap markets that may be scoped in by these rules. Special entities represent approximately 8% of market participants in swap markets.[1696] Out of 3,635 special entities subscribed to the ISDA August 2012 DF Protocol, 1,453 market participants (approximately 40%) elected to be a special entity under the protocol. This may indicate that a substantial number of market participants in swap markets may have opted into the special entity treatment. However, we note that using hand classifications of accounts in TIW data on 2006–2014, we estimate that special entities represent approximately 10.5% of single name CDS market participants by count (see Table 2 above). This estimate is comparable to the 8% of all special entities adhering to the ISDA August 2012 DF Protocol, and our hand classifications of accounts do not distinguish between special entities subject to ERISA, and those defined in but not subject to ERISA. Therefore, our analysis of special entity transaction activity throughout the release likely includes both special entities subject to ERISA, and entities defined in but not subject to ERISA that may opt out of the special entity protections of these final rules.

[1694] *See* Church Alliance (August 2011), *supra* note 5 and Church Alliance (October 2011), *supra* note 5, suggesting that church plans may benefit from enhanced conduct by SBS Entities in their advisory or intermediation roles, and requesting clarification of status of church plans for purposes of regulations under Dodd Frank.

[1695] As we discuss in Section VI.C.4.f, special entity rules will not apply to security-based swaps executed on registered or exempt SEFs or registered national security exchanges, where SBS Entities do not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with these final obligations. Therefore, special entities and entities defined in, but not subject to ERISA, regardless of their opt out decision, will continue to have access to anonymous SEF or exchange executed security-based swaps.

Special entity requirements and related costs will not apply to security-based swaps transacted on registered national securities exchanges and registered or exempt SEFs, if the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rules. We recognize that some security-based swaps executed on a SEF or exchange may be bilaterally negotiated, which may point to potential counterparty and information benefits of applying the business conduct rules to SEF and exchange traded security-based swaps. However, bilateral negotiations are likely to require an SBS Entity to know the identity of the counterparty at a reasonably sufficient time prior to execution to permit compliance. We also recognize that conflicts of interest may affect SBS Dealer recommendations of security-based swaps regardless of the venue in which these transactions are executed. It is not clear whether an SBS Dealer would be able to make a recommendation to a counterparty whose identity is not known at a reasonably sufficient time prior to execution. Finally, as we discuss throughout the release, while business conduct rules, including rules concerning special entities, may result in significant benefits, they will impose direct and indirect costs on SBS Entities. In the context of SEF transactions, the application of these rules may increase transaction costs, add complexity and delays, or require negotiation with counterparties. To the extent that security-based swaps executed through SEFs may represent exclusively arms-length transactions, the terms of which are not negotiated, the imposition of the final business conduct rules on such trades could increase costs without corresponding benefits anticipated by these final rules. For instance, if clearing reduces credit risk of counterparties, SBS Entities may compete on transaction costs and quality of execution, as opposed to credit risks of the transaction, as suggested by commenters.[1697] These final rules recognize these competing considerations and provide explicit relief for transactions executed on a registered or exempt SEF or registered national exchange, if the SBS Entity does not know the identity of the special entity counterparty at a reasonably sufficient time prior to execution of the transaction to permit compliance with the obligations of the rule. Finally, the Commission continues to recognize that the benefits of these final special entity rules are expected to primarily accrue to entities that are less informed about security-based swap markets. While special entities will not be able to opt out of the protections of these final rules as discussed in section VI.C.8, SBS Entities will be able to rely on an independent representative safe harbor, the economic effects of which are considered in detail in the sections that follow.

As discussed in Section II, the special entity definition does not include collective investment vehicles, and the final rules do not require SBS Dealers to determine whether any of the investors in the collective investment vehicle counterparty qualify as special entities. Such an approach limits the scope of application of these final rules, reducing potential counterparty protection and allocative efficiency benefits, but also potential costs and risks of loss of access by special entities and entities defined in, but not subject to ERISA, to security-based swaps.

b. *SBS Entities as Counterparties to Special Entities*

Under final Rule 15Fh–5(a) an SBS Entity that offers to enter or enters into a security-based swap with a special entity must have a reasonable basis to believe that the special entity has a qualified independent representative. Under Rule 15Fh–5(c), before initiating a swap, an SBS Dealer will also be required to disclose in writing the capacity in which the dealer is acting in connection with the security-based swap. Additionally, if the SBS Dealer or its associated persons engage or have engaged in business with the special entity in more than one capacity, the dealer would be required to disclose the material differences between such capacities and any other financial transactions or service involving the special entity. As discussed in section II.H.7 supra, the SBS Dealer may use generalized disclosures regarding the capacities in which the SBS Dealer and its associated persons have acted or may act with respect to the special entity, along with a statement distinguishing those capacities from the capacity in which the SBS Dealer is acting with respect to the present security-based swap. The requirements in Rule 15Fh–5 do not apply to a security-based swap if the transaction is being executed on a registered or exempt SEF or registered national securities exchange, and the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit compliance with these obligations.

Qualified independent representatives must have sufficient knowledge to evaluate the transaction and risks; may not be subject to statutory disqualification; undertake a duty to act in the best interests of the special entity; appropriately and timely disclose material information concerning the security-based swap to the special entity; evaluate, consistent with any guidelines provided by the special entity, the fairness of pricing and appropriateness of the security-based swap; and for certain types of special entities the representative must be subject to rules for the Commission, the CFTC, or a SRO prohibiting it from engaging in specified activities if certain political contributions have been made, unless the representative is an employee of the special entity. Independence requires that a representative does not have a relationship with the SBS Entity, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative. A representative will be deemed to be independent of an SBS Entity if, within one year of representing the special entity in connection with the security-based swap, the representative was not an associated person of an SBS Entity; provides timely disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the special entity; complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest; and the SBS Entity did not refer, recommend, or introduce it to the special entity within one year of the representative's representation of the special entity in connection with the security-based swap. As proposed by some commenters, ERISA plans will be able to comply with these requirements by relying on an ERISA fiduciary.[1698] Further, as we discuss in more detail below, the independence requirement refers to the representative's independence of the SBS Entity and not of the special entity and so, qualified investment representatives that are employees or associates of the special entity may qualify as independent representatives for the purposes of these rules.

[1696] This estimate is based upon data provided by ISDA as of December 31, 2015 on the number and type of market participants adhering to the ISDA August 2012 DF Protocol. *See* Memorandum from Lindsay Kidwell to File (Feb. 18, 2016) available on the Commission's Web site at *http://www.sec.gov/comments/s7-25-11/s72511.shtml* under "Meetings with SEC Officials." *See also* Section VI.B.

[1697] *See* SIFMA (August 2011), *supra* note 5 and BlackRock, *supra* note 5.

In contrast with the final rule, the proposed rule defined independence based on a two-prong test of (1) associated person status within the preceding year; and (2) ten percent or greater revenue reliance on a given SBS Entity. We are sensitive to commenter concerns that this definition may impose undue restrictions and cost burdens on SBS Entities, and may be difficult to implement.[1699] Further, the CFTC's independence formulation applicable to Swap Entities does not include a ten percent revenue prong in the independent test with special entities. In light of active cross-market participation and expected SBS Entity cross-registration, adopting a substantively different independence requirement from that required by Swap Entities may impose costs of compliance with two different independent representation standards. At the same time, it is unclear that such an approach would be more beneficial to counterparty protections, Commission oversight or enforcement in security-based swaps relative to the approach being adopted.

Under this rule, special entities transacting with more informed and sophisticated SBS Entities will have the benefit of representation by a qualified independent representative that has a duty to act in the best interests of the entity. To the extent that some special entities are less informed about security-based swaps and less able to unwind biases that may exist in potentially conflicted recommendations than other counterparties, this requirement may appropriately facilitate stronger protections and superior capital allocation decisions by special entities. Better informed special entities, such as large well-informed pension funds that regularly transact in security-based swaps, are likely to enjoy fewer benefits of this requirement. However, they may also be more likely to use investment advisers in their current security-based swap transactions, in which case they would need to make that representation to an SBS Dealer under Rule 15Fh–5(b). In addition, similar to our earlier discussion of suitability rules, to the extent that special entities may be entering security-based swap transactions with inferior risk-return characteristics as a result of internal incentive conflicts or macro factors, such as reaching for yield in a low interest rate environment, the benefits of these protections may be muted.

Further, special entities that transact with the SBS Dealer in a variety of roles, such as investment adviser or underwriter, will benefit from greater transparency about the capacity in which the dealer is entering the security-based swap. For instance, if an SBS Dealer currently engages in business with a special entity in the capacity of an investment adviser, the SBS Dealer would be required to disclose that it is not acting in such capacity if it is seeking to enter into a security-based swap with the special entity. This may help counterparties better understand the nature of the incentives of an SBS Dealer in relation to a given security-based swap transaction.

This rule will involve direct and indirect costs. SBS Entity counterparties will incur costs of obtaining a reasonable basis to believe that the special entity has a qualified independent representative. Based on our estimates in Section V, all SBS Entities acting as counterparties to special entities will incur an aggregate initial cost of, approximately, $132,819,500.[1700] Ongoing costs of compliance with rules for counterparties of special entities will involve updating representations and verifications for transactions with third-party non-employee independent representatives, estimated at $8,569,000.[1701] In-house independent representatives will bear costs of making representations to SBS Entities, which will involve an aggregate initial compliance burden of, approximately, $137,104,000 with an ongoing cost of $8,569,000.[1702]

In addition, some special entities may be entering security-based swaps with SBS Entities that are not in their best interest, and advice from qualified independent representatives may help inform special entities and enable them to make better investment decisions. Therefore, this rule may improve allocative efficiency of security-based swap investments. However, as noted earlier, SBS Entities are for-profit entities, and, to the extent that SBS Entities are currently intermediating security-based swaps that are not in the best interests of some of their special entity counterparties, the rule may lower an SBS Entity's profitability of intermediating security-based swaps with special entities. SBS Entities may attempt to recoup these costs in the form of less attractive security-based swap terms, or become less willing to transact with special entities. As an additional consideration, entities with activity levels below *de minimis* triggering SBS Dealer registration, but with positions large enough to require Major SBS Participant registration will bear these costs of intermediating transactions with special entities. If the costs of intermediated security-based swaps with special entities are substantial, some Major SBS Participants may reduce or stop transacting with special entity counterparties.

These costs may be lower if SBS Entities' special entity counterparties provide representations that allow SBS Entities to take advantage of the safe harbor in Rule 15Fh–5(b). Our data do not allow us to estimate the number of special entities currently relying on qualified independent representatives since we cannot observe whether they have conflicts of interest with SBS Entities that would preclude them from meeting independence requirements of these final rules. However, we note that, as reflected in the economic baseline, special entities represent approximately 10.5% of account holders in DTCC TIW between 2006 and 2014. Only approximately 2% of special entities did not rely on investment advisers in their single name CDS trades, with 85 unique pairs of SBS Dealers and U.S. special entities transacting in single name CDS. In 2014, there were 2 unique trading relationships between likely SBS Dealers and special entities without a third party investment adviser, representing approximately 0.039% of all transactions in 2014. Therefore, the overwhelming majority of special entities may already be relying on investment advisers in their security-based swap transactions. However, we do not observe whether advisors in TIW data meet the independence and qualification requirements being adopted in these final rules. If a significant fraction of third party representatives does not meet the qualified independent representative requirements in these final rules, special entity counterparties of SBS Entities may choose to replace third party representatives with those that do have requisite qualifications and independence, enabling continued transaction activity with SBS Entities, or may lose access to SBS Entity intermediated OTC security-based swaps.

[1698] *See* ABC, *supra* note 5 and SIFMA (August 2011), *supra* note 5.

[1699] *See, e.g.*, SIFMA (August 2011), *supra* note 5; APPA; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5; ABA Committees, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; Blackrock, *supra* note 5.

[1700] Aggregate initial cost: (In-house attorney at $380 per hour) × 349,525 hours = $132,819,500.

[1701] Ongoing aggregate cost: (In-house attorney at $380 per hour) × 22,500 hours = $8,569,000.

[1702] Initial cost: (In-house attorney at $380 per hour) × 360,800 hours = $137,104,000. We believe that in-house investment advisers may be compensated similarly to in-house attorneys. To the extent that the rate of compensation for independent representatives may be lower, these figures may overestimate the aggregate initial burden related to these final rules.

Ongoing: (In-house attorney at $380 per hour) × 22,500 hours = $8,569,000.

As estimated above, all special entity counterparties of SBS Entities will face costs of making representations to SBS Entities concerning their reliance on independent advisors acting in their best interests. To the extent SBS Entities transact with special entities that are not already relying on representatives, or are relying on representatives that would not meet the qualification and independence criteria in these final rules, such special entities would incur costs of obtaining a new representative and making necessary representations, if they wish to facilitate the SBS Entities' reliance on the safe harbor. This may increase demand for the services of qualified independent representatives, and independent representatives may require higher compensation to reflect such higher demand. Such costs will depend on the number of third-party representatives of special entities that do not currently meet the independence and qualification requirements of these final rules; the resulting increase in the demand for new representation; and the supply of investment advisers not currently representing special entities in security-based swaps that would be considered qualified and independent under these final rules. We lack data to quantify these effects and commenters did not provide information that would enable such quantification. We are, therefore, unable to estimate these costs.

Under the final rules, SBS Entities may become counterparties of special entities only if they have a reasonable basis to believe that the special entity has a qualified independent representative. We note that Rule 15Fh–1(b) allows SBS Entities to rely on written representations of a counterparty to satisfy its due diligence requirements. As a result, SBS Entities that can rely on representations will not be required to conduct independent assessments of the qualifications or independence of special entity representatives, as proposed by some commenters.[1703] These issues are discussed in further detail in Section VI.C.4.iv below.

c. SBS Dealers as Advisors to Special Entities

Rule 15Fh–2(a) introduces in a default presumption that an SBS Dealer acts as an advisor to a special entity when it recommends a security-based swap or a trading strategy that involves the use of a security-based swap to the special entity. The rule provides a safe harbor, where an SBS Dealer will not be acting as advisor when a special entity represents that it acknowledges that the SBS Dealer is not acting as an advisor, that the special entity will rely on advice from a qualified independent representative, and the SBS Dealer discloses to the special entity that it is not undertaking to act in the best interest of the special entity. The rule also provides a safe harbor for SBS Dealers transacting with ERISA special entities, where the SBS Dealer will not be acting as an advisor if the special entity represents that it has an ERISA fiduciary; the fiduciary represents in writing that it acknowledges that the SBS Dealer is not acting as an advisor; and the special entity represents either that it will comply in good faith with written policies and procedures designed to ensure that any recommendation received from the SBS Dealer involving a security-based swap transaction is evaluated by a fiduciary, or that any recommendation received from the SBS Dealer involving a security-based swap transaction will be evaluated by a fiduciary.

Rule 15Fh–4(b) establishes requirements for an SBS Dealer acting as an advisor to special entities. Rule 15Fh–4(b)(1) provides that an SBS Dealer acting as an advisor to a special entity shall have a duty to make a reasonable determination that any security-based swap or trading strategy involving a security-based swap recommended by the SBS Dealer is in the best interests of the special entity. Rule 15Fh–4(b)(2) requires an SBS Dealer acting as an advisor to a special entity to make reasonable efforts to obtain such information that the SBS Dealer considers necessary to make such a determination.

The final rules except transactions executed on registered or exempt SEFs or registered national securities exchanges if an SBS Dealer does not know the identity of the counterparty at a reasonably sufficient time prior to execution to permit compliance with these final obligations.

As discussed in detail in earlier sections, SBS Dealers enjoy informational advantages relative to their nondealer counterparties, and are for profit entities with business interests that may conflict with those of their counterparties in principal and/or agency transactions. Hence, SBS Dealers may have conflicts of interest related to the security-based swaps and the securities underlying them.[1704] Such conflicts of interest may influence SBS Dealer recommendations to their counterparties. The final business conduct rules may lessen the reliance of special entities on SBS Dealer recommendations, but, they may also limit special entities' access to security-based swap related investment advice and OTC security-based swaps.

Special entity counterparties may be aware of these fundamental incentives of SBS Dealers and of the complexity and opacity of security-based swaps, and may be able to recognize and parse out the potential bias in dealer recommendations. As discussed above, special entities represent a small fraction of market participants and almost exclusively rely on investment advisers. We also note that, to the extent special entities are currently allocating capital inefficiently in security-based swaps, they may be doing so for reasons unrelated to SBS Dealer recommendations, such as reaching for yield in a low interest rate environment, or as a result of fund manager incentive conflicts. If special entity participation in security-based swap markets is driven by these other factors and is not a result of reliance on SBS Dealer recommendations, the benefits of these rules may be reduced.

[1703] *See, e.g.*, SIFMA (August 2011), *supra* note 5.

[1704] *See* Sections VI.A and VI.C.2 for a more detailed discussion of informational asymmetries and conflicts of interest related to security-based swap dealing activity.

As we have noted in prior sections, based on TIW data for 2006 through 2014, approximately 98% of special entities transacting in single name CDS trades in TIW rely on advisors. We lack data to estimate how many of these advisors may be considered qualified independent representatives for the purposes of the safe harbor. However, we recognize that the economic effects of this rule may be significantly reduced if many SBS Dealers avail themselves of the safe harbor in their transactions with and recommendations to special entities.

We note that under the final rules, when an SBS Dealer makes a recommendation to a special entity, and obtains the representations and makes the disclosures required by the safe harbor, the SBS Dealer will not be required to comply with the best interest standard in Rule 15Fh–4(b). However, if, in such cases the special entity counterparty has less than $50 million in assets (and therefore, does not meet the institutional counterparty definition), the SBS Dealer will still be required to comply with its customer-specific suitability obligations in Rule 15Fh–3(f)(1)(ii). This provision imposes customer-specific suitability obligations on SBS Dealers who cannot take advantage of the institutional suitability alternative in Rule 15Fh–3(f)(2). This may enhance potential counterparty protection and allocative efficiency benefits of the final special entity rules relative to the alternative of not imposing customer-specific suitability obligations with respect to special entities under the safe harbor with less than $50 million in assets. Our data do not allow us to estimate how many special entities would fall under the $50 million asset size threshold; asset size thresholds for special entities at which the intended information and counterparty protection benefits of these final rules become significant; or the extent to which asset size and special entity sophistication may be correlated in security-based swap markets.

We also recognize that this approach diverges from the institutional suitability alternative adopted by the CFTC as part of business conduct standards for Swap Entities. As a result, all SBS Dealers that are dually registered with the CFTC as Swap Dealers will face two different standards of care in swaps and security-based swaps when making recommendations to special entities with less than $50 million in assets. As a result, dually registered SBS Dealers may choose not to rely on the institutional suitability alternative when making recommendations to special entities with less than $50 million in both swap and security-based swap markets. This aspect of the alternative may increase costs that SBS Dealers will incur as a result of advising and transacting with small special entities in security-based swaps. SBS Dealers may reduce their provision of advice to small special entities or pass on such costs to counterparties in the form of higher transaction costs or a decreased willingness to intermediate over-the-counter security-based swaps. Further, as discussed above, the Commission believes that suitability obligations for special entities with less than $50 million in assets may increase the potential counterparty protection and allocative efficiency benefits of the final special entity rules. Therefore, the primary economic effects of these rules depend on the degree to which special entities rely on conflicted SBS Dealer recommendations in their security-based swap decisions, the value of biased security-based swap recommendations by SBS Dealers, the relative cost of outside investment advice concerning security-based swaps, and the fraction of SBS Dealers that will be able to take advantage of the qualified independent representative safe harbor.

Therefore, the primary economic effects of these rules depend on the degree to which special entities rely on conflicted SBS Dealer recommendations in their security-based swap decisions, the value of biased security-based swap recommendations by SBS Dealers, the relative cost of outside investment advice concerning security-based swaps, and the fraction of SBS Dealers that will be able to take advantage of the qualified independent representative safe harbor.

SBS Dealers will be unable to recommend security-based swaps that are not in special entities' best interests, and will therefore forego potential incremental profits from such transactions. SBS Dealer "best interest" determinations concerning recommended security-based swaps may potentially give rise to dealer liability or litigation risk if there are differences of opinion concerning the relative merits of different security-based swaps and counterparties incur losses. SBS Dealer registration is not currently required, disclosure of litigation reserves by SBS Dealers is not mandatory, and the economic magnitude of such costs will depend on how special entities, their representatives and SBS Dealers will respond to these final rules. Therefore, we are unable to estimate these costs. However, we recognize that some SBS Dealers may incur such costs. In addition, the aggregate initial costs of revising representations and collecting requisite information from special entities related to the requirements for SBS Dealers serving as advisors to special entities are estimated at $741,000.[1705]

SBS Dealers that are most affected by these costs may respond to the final rules by ceasing to provide security-based swap recommendations to special entities, limiting special entities' access to such investment advice, or by decreasing their willingness to intermediate OTC security-based swaps with special entities. However, we note that SBS Dealers that lose the most profit as a result of the requirement to provide advice in their counterparties' best interests may have been issuing more conflicted recommendations that were not in the special entities' best interests. Therefore, special entities may lose access to such conflicted advice, but the remaining advice by SBS Dealers should be consistent with special entities' best interest.

d. Independent Representation: Alternatives

We have considered alternatives that result in tightening of the independence requirements for representatives, for instance, through the imposition of a longer look back period in the associated person prong of the independence definition. More stringent independence requirements may mitigate potential conflicts of interest and biases in security-based swap recommendations registered representatives make to special entities. However, as tabulated in Table 2, the majority of market participants rely on investment advisers for their security-based swap transactions, and more stringent definitions will limit the number of representatives qualified to advise special entities in security-based swaps. A decrease in the supply of independent representatives may increase the cost of retaining independent representation and limit access by smaller, less sophisticated counterparties that benefit from independent advice and representation in opaque and complex security-based swap transactions. Further, more stringent independence requirements may decrease the level of specialized expertise of representatives. We have received mixed comments on the relative merits of various definitions of independence, commenters did not quantify the economic costs or benefits of the alternatives[1706] and no such data is available at present time. As indicated earlier, the independence definition being adopted is consistent with the CFTC's approach in swap markets.

[1705] Initial cost: (In-house attorney at $380 per hour) × ((250 hours to draft, review and revise the representations in standard SBS documentation) + (1,700 hours to collect information from each special entity) = $741,000.

Finally, we have considered eliminating the independent representative safe harbor from the special entity requirements, as suggested by some commenters.[1707] To the extent that unsophisticated counterparties rely on independent outside advisors or professional portfolio managers acting in their best interest, the economic effects of potential biases in SBS Dealer recommendations may be mitigated. Sophisticated entities and entities relying on independent advice from qualified fiduciaries are less likely to benefit from SBS Dealer best interest recommendations, particularly in light of the disclosures being adopted as part of these final rules. At the same time, the costs of SBS Entity advice under the best interest standard would be passed on to special entities, increasing costs of security-based swaps and potentially limiting market access for special entities. Further, SBS Entities may have superior information about security-based swaps, but face information asymmetries concerning the nature of financial and business risks of their counterparties. Special entities may be better able to assess the relative merits of a given security-based swap transaction when relying on independent qualified representatives, as opposed to engaging SBS Entities to make such recommendations under a best interest standard.

Similarly, prohibiting SBS Dealers from selling derivatives when the special entity would be better served by more traditional debt instruments, as suggested by one commenter,[1708] will impede market access by special entities to a potentially valuable vehicle for risk mitigation. For some special entities, particularly for sophisticated entities, entities relying on independent advice from qualified advisors, and entities with risk management needs best addressed by OTC security-based swaps, such costs are likely to be significant. Further, this alternative would preclude special entities from accessing one of the vehicles for trading on negative information about risks of the underlying securities. Excluding informed and sophisticated special entities from security-based swaps markets may decrease price efficiency and liquidity, and fragment swap, security-based swap and underlying reference security markets. However, if such special entities are prohibited from accessing OTC security-based swaps, these entities would be able to access standardized security-based swaps traded on registered national exchanges or SEFs. This may increase the volume of security-based swap trades transacted on these platforms.

e. Reliance on Representations

Rule 15Fh–1(b) allows SBS Entities to rely on the written representations of a counterparty to satisfy its due diligence requirements, unless they have information that would cause a reasonable person to question the accuracy of the representation. While these final rules impose new costs on SBS Entities, Rule 15Fh–1(b) will enable SBS Entities to rely on representations in lieu of independent due diligence, under certain circumstances. Since SBS Entities may be able to rely on representations to fulfil the requirements in these final rules, we expect they will do so when the costs of reliance on representations are lower than those of independent due diligence, to the extent that special entities are willing and able to provide representations that meet the requirements of the rule. This may, therefore, provide potentially beneficial flexibility to SBS Entities in managing their compliance obligations under these final rules.

Relying on special entities' representations concerning the qualifications, and independence of investment representatives should be less costly for SBS Entities than conducting independent substantive evaluations of qualifications and independence of their counterparties' representatives. To the extent that the best interest standard introduces costs for SBS Entities, and to the extent that the qualified independent representative safe harbor may mitigate these costs as discussed in prior sections, Rule 15Fh–1(b) may enable SBS Entities to make recommendations and serve as counterparties to special entities at lower costs under reliance on counterparty representations than under independent due diligence. However, if an SBS Entity has information that would lead a reasonable person to question the accuracy of the representation, SBS Entities will be required to perform independent due diligence.

We have considered an "actual knowledge" standard as an alternative to the reliance on representation standard. Under an "actual knowledge" standard, an SBS Entity can rely on a representation unless it knows that the representation is inaccurate. The alternative could allow SBS Entities to rely on questionable representations insofar as they do not have actual knowledge that the representation is inaccurate, even if they have information that would cause reasonable persons to question their accuracy. As a result, this alternative would reduce the benefits of the verification of status, know your counterparty, suitability and special entity requirements and result in weaker protections for counterparties to SBS Entities. However, SBS Entities would be able to rely on counterparty representations with respect to a potentially greater set of transactions and counterparties. To the extent that reliance on representations may lower SBS Entity costs from these final business conduct rules, this actual knowledge standard alternative for reliance on representations has the potential to further reduce costs.

We have received mixed comments on the relative merits of these standards, with some commenters supporting the actual knowledge standard,[1709] others supporting the reasonable person reliance standard,[1710] and others opposing both standards as too low.[1711] None of the commenters quantified the potential economic costs or benefits of the proposed standards, and we lack information or data to quantify the above economic effects. For instance, we lack information about the number of transactions between special entities and SBS Entities conducted in reliance on representations, the accuracy of which reasonable persons would question but where SBS Entities lack actual knowledge of falsehood, and the costs of independently evaluating a representative's qualifications and independence which will depend on an individual SBS Entity's choice to perform due diligence in house and the efficiency of related internal business processes, or to retain a third party due diligence provider and the related choice of service provider. In addition, we have received comment that, where SBS Dealers are required to conduct independent due diligence, they may face potential litigation risk if they approve a representative who is subsequently determined to be lacking expertise, as well as potential litigation from representatives whom they have chosen to disqualify, which may discourage SBS Dealers from intermediating OTC security-based swaps with certain groups of counterparties.[1712] Commenters have not provided any information to enable us to quantify these costs and we have no data to enable such quantification.

[1706] *See, e.g.,* Better Markets (August 2011), *supra* note 5; NAIPFA, *supra* note 5; CFA, *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; APPA; BlackRock, *supra* note 5; SIFMA (August 2011), *supra* note 5; and Blackrock, *supra* note 5.

[1707] Better Markets (August 2011), *supra* note 5; CFA, *supra* note 5; and AFSCME, supra note 5.

[1708] *See* CFA, *supra* note 5.

[1709] *See, e.g.,* SIFMA (August 2011), *supra* note 5; FIA/ISDA/SIFMA, *supra* note 5; CCMR, *supra* note 5; APPA, *supra* note 5; BlackRock, *supra* note 5); ABC (2011); ABA Committees, *supra* note 5.

[1710] *See, e.g.,* Better Markets (2011).

[1711] *See* CFA, *supra* note 5 and AFSCME, *supra* note 5.

We note that under CFTC rules, Swap Entities are subject to the reasonable person reliance standard being adopted in these final rules. We also note that swap and security-based swap markets are interconnected, market participants transact across these markets, and many SBS Entities are expected to be dually-registered as Swap Entities. If the same dealers face differential compliance costs of transacting over the counter with the same special entities in, for instance, single name and index CDS, dealing activity may flow to the market with lower compliance costs, potentially fragmenting price discovery and liquidity. Further, the standard being adopted is likely more timely and cost effective than an approach permitting no reliance on representations.

We have also considered alternative approaches involving a higher standard for reliance on representations or requiring SBS Entities to conduct an independent analysis of conflicts and qualifications of each independent representative of a special entity, with which they may be negotiating swaps. This approach may enhance SBS Entities' due diligence with respect to representatives of special entity counterparties, but may decrease the willingness or ability of SBS Entities to provide special entities with access to security-based swaps.[1713] As an additional consideration, we understand that most market participants in swap markets and Swap Entities have adopted a multilateral protocol as a means of complying with the CFTC external business conduct rules. While we understand that the representations contained in the protocol only expressly address swap transactions, we have received comment that factual matters addressed by those representations typically do not vary between swap and security-based swap transactions. To the extent that cross-market participation of dealers and non-dealer counterparties is a significant feature of security-based swap markets, requiring dually-registered SBS Entities to obtain separate representations or conduct independent due diligence specifically addressing security-based swaps may impose additional costs, which may be passed on to counterparties and limit their access to OTC security-based swaps.[1714] In addition, as discussed above, we have received comment that requiring SBS Dealers to conduct independent due diligence may lead to potential litigation risk from approving representatives subsequently determined to be lacking expertise or representatives that are disapproved. According to the comment letter, this may discourage SBS Dealers from intermediating OTC security-based swaps with certain groups of counterparties.[1715] The commenter did not provide any estimate of such potential costs and the Commission has no data to enable such quantification. However, we recognize that these costs may be significant, and it is unclear that the independent due diligence alternative is superior to the reliance on representation approach being adopted.

f. Magnitude of the Economic Effects

When considering the likely magnitude of the economic effects of special entity rules discussed above, we note that, based on data for November 2006 through December 2014, approximately 98% of special entities relied on investment advisors for their single name CDS trades in DTCC–TIW, and only approximately 2% of special entities acted as a transacting agents.[1716] We lack data or other information to estimate how many investment advisers currently representing special entities in security-based swap markets will be considered qualified and independent for the purposes of compliance with these final rules, or how many SBS Entities would be able to rely on the independent representative safe harbor in their transactions with special entities. Commenters did not provide data that would enable such quantification. In addition, we lack data on the associations of investment advisers with SBS Entities in the past year, the extent of their advisory roles in relationships with special entities, the existence of conflicts of interest, and other information. Therefore, we cannot quantify how many special entities may be able to rely on representations. However, in light of special entities' heavy reliance on investment advisers in security-based swap transactions, it is unclear whether a substantial portion of special entities rely on SBS Entity recommendations in their security-based swap transactions.

We also recognize similarities between the CFTC's business conduct standards, FINRA rules, and the rules being adopted, as well as extensive cross-market participation—all of which may reduce both the economic costs (if dually registered entities have already restructured their compliance infrastructure to comply with similar rules) and the benefits of these rules (if, for instance, special entities have learned about potential biases in recommendations from new market practices of the same dealers in other financial markets). We note that our final business conduct standards include transaction level requirements. Therefore, as we discuss and estimate above, some benefits and costs related to individual security-based transactions are still likely to accrue to special entities, their qualified independent representatives, and SBS Entities; even those already subject to similar rules in other markets. Further, some SBS Entities and potential new entrants may not be cross-registered with the CFTC or with FINRA, and may, therefore, not already be subject to similar rules in other markets.

Finally, the rules relating to transactions with special entities will not apply to security-based swaps executed on registered or exempt SEFs or registered national security exchanges, where SBS Entities do not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the SBS Entity to comply with the obligations of the rules. Therefore, special entities would not receive the benefits of additional counterparty protections of these rules when transacting anonymously through SEFs or registered national securities exchanges. However, as noted earlier these final rules may increase the costs of SBS Entities and reduce their information rents, which may lead SBS Entities to seek to recover lost profits through more adverse terms of OTC swaps sold to special entities, or reduced willingness to transact with special entities. Since anonymous SEF or exchange traded security-based swaps will not be subject to these final requirements, the risk that special entities will lose access to security-based swaps may be reduced.

[1712] *See* ABC, *supra* note 5.

[1713] *See, e.g.*, NAIPFA, supra note 5.

[1714] *See* SIFMA (November 2015), supra note 5.

[1715] *See* ABC, *supra* note 5.

[1716] Approximately 95% of special entities relied on SEC registered investment advisers, and another 3% of special entities used unregistered investment advisers. *See* Table 2 of the economic baseline, Section VI.B supra.

5. Fraud, Fair and Balanced Communications, Supervision

a. Antifraud

The final business conduct rules include a set of antifraud provisions covering SBS Entity transactions with all counterparties, and with special entities. With respect to special entities, rules 15Fh–4(a)(1) and 15Fh–4(a)(2) prohibit SBS Entities from employing any device, scheme, or artifice to defraud special entities, and from engaging in any transaction, practice or course of business that operates as a fraud or deceit. Rule 15Fh–4(a)(3) imposes a general ban on SBS Entities engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative.

To the extent fraudulent, deceptive or manipulative conduct may affect the choice of the SBS Entity's counterparty and the decision to enter into a given swap, antifraud protections may lead to an increased flow of transactions to SBS Entities not engaging in fraudulent practices. To the extent that the risk of fraud may affect the willingness of market participants to transact in security-based swap markets, antifraud protections may increase the willingness of non-SBS or Swap Entity counterparties to participate in security-based swap markets. We recognize that, as indicated by a commenter, general antifraud and anti-manipulation provisions of existing federal securities laws and Commission rules offer similar protections.[1717] Therefore, the magnitude of these economic benefits relative to the economic baseline is expected to be *de minimis*. Further, in light of SBS Entities' ongoing statutory antifraud obligations, we anticipate that entities likely to trigger SBS Entity registration requirements have already developed policies and procedures necessary for compliance with these final rules. Therefore, the magnitude of the economic costs to SBS Entities from these final rules is expected to be *de minimis* as well.

The Commission is not establishing a policies and procedures safe harbor for non-scienter violations, or provisions regarding the protection for counterparty confidential information. As an alternative to these final rules, the Commission could adopt such a safe harbor. For instance, the Commission could adopt a rule where an SBS Entity would be able to establish an affirmative defense by demonstrating that it did not act intentionally or recklessly, and complied in good faith with written policies and procedures reasonably designed to meet this particular requirement. The adoption of such a safe harbor may reduce compliance and litigation costs related to nonscienter fraudulent, deceptive or abusive practices or conduct that may occur despite SBS Entities having developed and implemented all relevant policies and procedures, acting in good faith. However, a safe harbor against fraud may weaken counterparty protections in a market for complex and opaque securities.

b. Fair and Balanced Communications

Under rule 15Fh–3(g), SBS Entities are required to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. As discussed in Sections I and II, this rule is harmonized with FINRA's communications with the public rule. To the extent that up to 16 likely SBS Entities may be cross-registered as broker-dealers, some SBS Entities are already complying with these requirements with respect to securities transactions. Specifically, all communications must provide a sound basis for evaluating a given security-based swap or trading strategy, communications may not imply that past performance will recur, or make exaggerated and unwarranted claims. Rule 15Fh–3(g) clarifies the kinds of communications that would be consistent with fair dealing or good faith communications. In conjunction with the antifraud rules and enhanced disclosure requirements, the fair and balanced communications rule aims to provide transparency to market participants transacting with SBS Entities. To the extent to which counterparties of SBS Entities may have asymmetric information or are less sophisticated, this requirement may help protect counterparties and improve their ability to select the most appropriate security-based swap and counterparty.

We recognize that the requirement may impose costs on SBS Entities. As indicated in Section V, the related initial aggregate costs are estimated at $917,400 for the industry, with ongoing costs of approximately $125,400.[1718]

c. Supervision

Rule 15Fh–3(h) requires SBS Entities to establish and maintain a supervision system and diligently supervise their business and the activities of their associated persons. At a minimum the supervisory system must (1) designate at least one person with supervisory authority for each type of a business in which the SBS Entity engages that requires registration as an SBS Entity; (2) use reasonable efforts to determine that all supervisors are qualified; and (3) establish, maintain and enforce written policies and procedures addressing the supervision of the types of security-based swap business an SBS Entity is engaged in and the activities of its associated persons, that are reasonably designed to prevent violations of applicable securities laws, and rules and regulations thereunder. The rule lists specific types of policies and procedures that must be included.

In addition, SBS Entities and their associated persons will not be deemed to have failed to diligently supervise if (1) the SBS Entity has certain written policies and procedures and a documented system for applying them that would reasonably be expected to prevent and detect, insofar as practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to security-based swaps; and (2) the SBS Entity or its associated person has reasonably discharged the duties and obligations required by such written policies and procedures and system, and did not have a reasonable basis to believe they were not being followed.

Lastly, SBS Entities have an obligation to promptly amend written supervisory policies and procedures when there are material changes to applicable securities laws, rules and regulations, or when there are material changes to the SBS Entity's business or supervisory system. SBS Entities are also required to promptly communicate any material amendments to their supervisory procedures to all associated persons to whom such amendments are relevant based on their activities and responsibilities.

The Commission recognizes that these final supervision rules may impose certain burdens and costs on SBS Entities. Specifically, SBS Entities will be required to establish and maintain a supervision system consistent with the minimum requirements articulated in Rule 15Fh–3(h); to diligently supervise their business and the activities of their associated persons; and to amend their written supervisory policies and procedures when material changes occur to applicable laws, rules or regulations or to their business or supervisory systems, and promptly communicate such amendments to all associated persons to whom such amendments are relevant.[1719] Based on estimates in Section V, compliance with the supervision rules may involve an aggregate initial cost of $39,317,850 and an ongoing cost of $8,405,100 for all SBS Entities.[1720] In addition, these final rules impose new supervision requirements on SBS Entities, which may increase the probability and related costs of responding to legal actions. However, to the extent that these supervision rules may enhance compliance with federal securities laws and Commission rules and regulations thereunder, the probability and costs of responding to regulatory inquiries and private actions may actually decrease.

[1717] *See* Barnard, *supra* note 5.

[1718] Initial internal cost: (In-house attorney $380 per hour) × 330 = $125,400. Initial external legal counsel costs: $330,000 + $462,000 = 792,000. Ongoing costs: (In-house attorney $380 per hour) × 330 = $125,400.

We have considered the alternative of excluding Major SBS Participants from the scope of the supervision rules and have received mixed comment on the issue, as discussed in Section II. One commenter indicated that the rule may impose burdensome and costly supervisory procedures on Major SBS Participants that are not appropriate given their non-dealer role in the marketplace, and the potential costs of compliance "would be without any meaningful offsetting benefit for other market participants or the financial markets as a whole."[1721] The commenter did not provide any data to quantify potential costs or benefits for Major SBS Participants. We recognize that these rules impose requirements and costs on Major SBS Participants they are not currently required to bear, as reflected in our estimates. We also note that the Commission elsewhere estimated that only between zero and five entities may seek to register with the Commission as Major SBS Participants. The Commission continues to believe that due to their large positions in security-based swaps, activities of Major SBS Participants may pose significant risks, such as market and counterparty risks, in security-based swap markets, as discussed in Section II above, the Commission believes the application of the rules is thus appropriate.

6. CCO Rules

Rule 15Fk–1 requires an SBS Entity to designate a CCO, and imposes certain duties and responsibilities on that CCO, including the preparation of an annual compliance report. In addition, under Rule 15Fk–1(d), the compensation and removal of the CCO require the approval of a majority of the board of directors of the SBS Entity. We note that the adopted SBS Entity registration forms already require SBS Entities to designate an individual to serve as a CCO, which enters into an economic baseline against which we are assessing the effects of these final rules. Therefore, the primary economic effects of these final CCO rules stem from the annual compliance report requirement, other duties of the CCO, and CCO compensation and removal requirements.

a. Annual Compliance Report, Conflicts of Interest, Policies and Procedures

Rule 15Fk–1(c) requires each SBS Entity's CCO to prepare and sign an annual compliance report containing a description of the SBS Entity's written policies and procedures described in paragraph (b) of the rule, including the code of ethics and conflict of interest policies. The report must also contain a description of: the SBS Entity's assessment of the effectiveness of its policies and procedures relating to its business as an SBS Entity; any material changes to the SBS Entity's policies and procedures; any areas for improvement, and recommended potential or prospective changes or improvements to the SBS Entity's compliance program and resources devoted to compliance; any material non-compliance matters; and the financial, managerial, operational, and staffing resources set aside for compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBS Entity, including any material deficiencies in such resources. Further, SBS Entities must promptly submit an amended compliance report if material errors or omissions in the report are identified. The submission of the annual compliance report as required by the final rules may help the Commission assess the compliance activities of SBS Entities.

In addition, Rule 15Fk–1(b)(2) requires the CCO to take reasonable steps to ensure that the SBS Entity establishes, maintains and reviews policies and procedures reasonably designed to achieve compliance with the Act and the rules and regulations thereunder relating to its business as an SBS Entity by: Reviewing the compliance of the SBS Entity; and taking reasonable steps to ensure that the SBS Entity establishes policies and procedures for the remediation and handling of non-compliance issues. Rule 15Fk–1(b)(3) requires the CCO, in consultation with the board of directors or senior officer, to take reasonable steps to resolve any material conflicts of interest that may arise; and Rule 15Fk–1(b)(4) requires the CCO to administer each policy and procedure required to be established under Section 15F of the Exchange Act and the rules and regulations thereunder.

Our final rules impose a set of duties and responsibilities on CCOs of SBS Entities. As described in the economic baseline and discussed in earlier sections, the Commission believes that a number of entities that will seek to register as SBS Entities may be dually registered, and may already be required to comply with some of these rules in swap or reference security markets. However, we note that SBS Entity registration is currently not required, and entities intermediating security-based swaps, including dually registered entities, are not required to comply with business conduct or CCO rules relating to their business as an SBS Entity. Therefore, these rules impose a new set of requirements on a population of SBS Entity registrants as they pertain to security-based swap business. To the extent that CCO oversight may facilitate compliance, the above rules may enhance compliance of SBS Entities with federal securities laws and other Commission rules.[1722]

Based on our analysis in Section V, the establishment and administration of the policies and procedures required under Rule 15Fk–1 will involve a total initial cost of approximately $13,105,950, and an ongoing cost of approximately $2,801,700 per year for all SBS Entities.[1723] Ongoing costs of preparation of an annual compliance report by the CCO is estimated at approximately $2,480,775 for all SBS Entities.[1724]

In addition, these rules impose new requirements concerning CCO duties. These final rules also require the annual compliance report to include a certification by the CCO or senior officer, and may increase CCO or senior officer liability when the CCO or senior officer executes the required certification. If SBS Entity CCOs or senior officers are risk averse, they may require additional liability insurance, higher compensation or lower incentive pay as a fraction of overall compensation. To the extent that liability may be a significant consideration for some SBS Entities, this may lower the labor supply of senior officers or CCOs in security-based swap markets.

[1719] *See* Section V for an estimate of burdens and costs related to the diligent supervision rules.

[1720] Initial internal cost: (Compliance manager $283 per hour) × 103,950 = $29,417,850. Initial external legal counsel costs: $9,900,000. Ongoing costs: (Compliance manager $283 per hour) × 29,700 = $8,405,100.

[1721] *See* MFA, *supra* note 5.

[1722] The Commission has elsewhere stated that strong internal compliance programs lower the likelihood of non-compliance with securities rules and regulations. *See* SDR Registration Release, 80 FR at 14543, *supra* note 1202.

[1723] Initial cost of policies and procedures: (Compliance manager at $283 per hour) × 34,650 hours = $9,805,950. Initial cost of outside counsel: $3,300,000. Total initial cost: $9,805,950 + $3,300,000 = $13,105,950. Ongoing cost: (Compliance manager at $283 per hour) × 9,900 hours = $2,801,700.

[1724] Ongoing cost of compliance reporting: (CCO at $485 per hour) × 5,115 hours = $2,480,775.

b. CCO Removal and Compensation

CCOs play a central role in monitoring compliance with federal securities laws and regulations. These final rules elevate approval of decisions regarding the compensation or removal of the CCO to the board. As indicated in the proposing release, the Commission believes that the approach being adopted may reduce inherent conflicts of interest that arise when CCO compensation and removal decisions are made by individuals whose compliance with applicable law and regulations the CCO is responsible for monitoring.[1725] The rule, therefore, may mitigate CCO conflicts of interest within SBS Entities, and may strengthen SBS Entity compliance with federal securities laws and Commission rules, including these final business conduct rules.

SBS Entities are expected to be primarily large institutions and may be part of organizational structures that include hundreds of entities, with varying levels of business complexity. Many SBS Entities may also be active in swap markets, while others may also perform broker-dealer functions or have banking operations; yet others may focus their primary business on security-based swaps. As a result, different governance and oversight structures may be suitable for different SBS Entities depending on their internal operations, business complexity, and the role security-based swap transactions play in their overall operations, among others. Therefore, the rule limits the ability to delegate CCO compensation and removal decisions to a senior officer, which may be optimal for some SBS Entities.

CCO compensation and removal decisions require an understanding of security-based swap markets and the SBS Entities' business opportunities in such markets, compliance risks related to various SBS Entity activities and transactions, the labor market for CCOs of SBS Entities, and an ability to infer the quality of skills and effort exerted by the CCO from performance. To the extent SBS Entity boards lack specific expertise necessary to approve compensation and removal decisions, such boards may currently delegate these functions to other officers, such as head of compliance, chief risk officer, or other persons. As a result of the final rules, such delegation will not be permitted, and boards of some SBS Entities may be required to gather additional information or gain expertise necessary to approve compensation and removal decisions.

SBS Entities that currently delegate these functions to other officers may need to refocus board resources on the area of compliance. As a result, SBS Entity boards may need to replace existing directors, hire new directors, or retain the services of independent executive search and compensation consultants that are familiar with security-based swaps. This may detract from the time and resources SBS Entity boards are able to invest in overseeing activities in other markets, which may represent a larger fraction of the business and shareholder profits for some SBS Entities. To the extent that SBS Entity boards face time and resource constraints, they may also become less effective at monitoring and advising SBS Entities in areas outside of compliance. Further, the requirement that SBS Entity boards approve CCO compensation and removal decisions, may increase the liability of SBS Entity's directors, which may increase the costs of director liability insurance and director compensation. Nevertheless, as discussed above, the Commission continues to believe that these final rules may reduce certain conflicts of interest related to CCO compensation and removal decisions, which may strengthen SBS Entity compliance with federal securities laws and Commission rules.

The final rules do not address the appointment of the CCO. However, the rules require the CCO to report directly to the board or senior officer, and require decisions regarding the compensation and removal of the CCO to be approved by the board. As a result, some SBS Entities may separate reporting to and appointment by the senior officer, from compensation and removal decisions by the board. The Commission recognizes that appointment, compensation and removal decisions may be inextricably intertwined, requiring an informed assessment of the CCO's talent, abilities, expertise and performance when compared against external candidates, as well as an understanding of the CCO labor market. Further, a senior officer may have conflicts of interest in CCO appointment decisions similar to those present in CCO compensation or removal decisions. A potential separation of the CCO reporting line and appointment decisions from compensation and removal decisions may decrease the quality of these decisions. However, the ability of some SBS Entity boards to continue to rely on senior officers for the CCO to report to and for appointment decisions may mitigate some of the resource drain on boards of SBS Entities discussed above.

We have considered an alternative approach under which only independent members of the board can approve decisions regarding the compensation, appointment and removal of CCOs, as proposed by some commenters,[1726] as well as requiring certain minimum CCO qualifications and governance practices. Independent directors may have fewer conflicts of interest and may be less likely to be influenced by CCOs, strengthening their oversight role, which may enhance SBS Entity compliance with security laws, and rules and regulations thereunder. At the same time, outside directors face an informational asymmetry with respect to the SBS Entity's risks and investment opportunities, and may lack an intimate understanding of the SBS Entity's business. We understand that SBS Entities may trade off the value of specific expertise in security-based swaps on the one hand, with the value of independence in the face of potential conflicts of interest on the other hand, in the context of each SBS Entity's operations. Requiring specific CCO qualifications and other governance practices of all SBS Entities may enhance compliance for some SBS Entities, but may also involve potentially costly restructuring of internal governance structures and operations while offering few benefits for other SBS Entities as recognized by one commenter.[1727]

Additionally, appropriate CCO qualifications may depend on the CCO's functional roles and expertise, and business activities that the SBS Entity engage in, particularly for SBS Entities that operate within larger consolidated financial institutions with the same CCO. One-size-fits-all qualification requirements or competency exams would restrict the level and type of expertise of CCOs that SBS Entities are able to retain, and would require some SBS Entities to remove the current CCOs and search for new CCOs meeting the imposed qualification requirements. Crucially, it is not clear how many SBS Entities currently hire and retain underqualified CCOs. The Commission is not requiring any particular level or type of competency or business experience for a CCO as part of these final rules. However, as discussed in Section II, the Commission believes that an SBS Entity's CCO generally should be competent and knowledgeable regarding the federal securities laws, empowered with full responsibility and authority to develop appropriate policies and procedures for the SBS Entity, as necessary, and responsible for monitoring compliance with the SBS Entity's policies and procedures adopted pursuant to rules under the Exchange Act. Similarly, mandatory quarterly or annual meetings with the board or certain committees of SBS Entities, proposed by one commenter,[1728] may not mitigate potential conflicts of interest involving CCOs, or facilitate compliance where such conflicts or deficiencies stem from board or committee collective action problems, weak monitoring or misaligned incentives, instead of a lack of communication or information.

[1725] *See* Proposing Release, 76 FR at 42451, *supra* note 3.

[1726] *See, e.g.,* Barnard, *supra* note 5 and Better Markets (August 2011), *supra* note 5.

[1727] *See* FIA/ISDA/SIFMA, *supra* note 5.

As discussed in Section II, commenters disagreed on the relative merits of the approach being adopted and the alternatives above.[1729] The above economic effects are not readily amenable to quantification. Commenters did not provide data or other information that would facilitate quantification of these effects; no such data is publicly available. The overall effects of these competing considerations regarding the CCO rules being adopted depend on internal governance structures of SBS Entities, their organizational complexity, severity of the conflicts of interest between SBS Entity CCOs and other officers, reliance of existing SBS Entity boards on external executive search and compensation consultants, importance of security-based swap performance and compliance for SBS Entity profitability and counterparty protections, optimal delegation of oversight, and the ways in which SBS Entities may restructure their business in response to these and other pending substantive Title VII rules.

7. Pay To Play

Rules 15Fh–5(a)(1)(vi) and 15Fh–6 impose a two-year time out period after certain political contributions by security-swap dealers and certain independent representatives. Rule 15Fh–6(b) generally prohibits SBS Dealers from offering to enter into, or entering into, a security-based swap or trading strategy involving a security-based swap with a municipal entity within two years following any contribution to an official of such municipal entity made by the SBS Dealer or any of its covered associates. The rule also prohibits SBS Dealers and any covered associates from providing or agreeing to provide payment to any person to solicit a municipal entity to offer to enter into, or to enter into, security-based swaps, unless such person is a regulated person. The rule prohibits SBS Dealers and any covered associates from coordinating or soliciting any person or political action committee to make contributions to officials of a municipal entity, or to a political party of a state or locality, with which the SBS Dealer is offering to enter into, or has entered into, a security-based swap or a trading strategy involving a security-based swap.

Under Rule 15Fh–6(a)(2) covered associates will include general partners, managing members, executive officers or other persons of similar status or function; employees who solicit municipal entities to enter security-based swaps with an SBS dealer, and all persons directly or indirectly supervising such employees; and political action committees controlled by such persons or SBS Dealers.

These final rules also limit political contributions by independent representatives in security-based swaps. Under Rule 15Fh–5(a) SBS Entities who offer to enter into or enter into a security-based swap with a special entity must have a reasonable basis to believe that the special entity has a qualified independent representative. Rule 15Fh–5(a)(1)(vi) provides that in the case of a special entity, a qualified independent representative is a person that is subject to rules of the Commission, the CFTC or an SRO prohibiting it from engaging in specified activities if certain political contributions have been made, except where the independent representative is an employee of the special entity.

As discussed in more detail below, our economic analysis of these final rules reflects the fact that a large majority of entities expected to seek registration as SBS Entities are expected to be dually registered and required to comply with similar pay to play rules in other markets.

These final rules are intended to address pay to play relationships that may interfere with the process by which municipal entities allocate capital to security-based swaps to enhance returns or manage risk on behalf of their stakeholders.[1730] To the extent that these final rules reduce the incidence of pay to play practices, municipal entities may become less subject to conflicts of interest related to political contributions by SBS Dealers. To the extent that conflicts of interest related to political contributions may currently be affecting capital allocation by municipal entities, resulting in inefficiencies from conflicted counterparty or product selection, these rules may benefit municipal entities and their stakeholders. Consistent with the expected benefits articulated in the proposing release, these rules may deter undue influence from SBS dealers and advisors. Therefore, these rules may enhance counterparty protections of municipal entities and increase allocative efficiency. In addition, these rules may also encourage SBS Dealers to compete on the merits of the transaction. Similarly, under Rule 15Fh–5 qualified independent representatives of special entities in security-based swaps will be employees and representatives subject to pay to play rules of the Commission, the CFTC or an SRO, such as registered municipal advisors or registered investment advisers. To the extent that some special entities may currently rely on advisors that are not employees or registered investment or municipal advisors, special entities may become less affected by potential conflicts of interest of representatives, and independent representatives may be encouraged to compete on their qualifications, service quality, and cost. These benefits may flow through to stakeholders of municipal entities, such as participants in public pension plans and taxpayers.

To the extent that SBS Dealers are currently recovering the costs from pay to play practices in the form of higher prices of security-based swaps, these final rules may decrease transaction costs. We have no data or other information on the prevalence of political contributions of SBS Dealers, the number and contributions of their covered associates, and transaction costs and non-price terms of security-based swaps offered for sale to special entities. Such data is not publicly available and commenters have not provided data to enable such quantification. However, a study by Butler, Fauver and Mortal (2009) found that negotiated bid deals had underwriter gross spreads of 12–14 basis points (about one-seventh of the mean gross spread) higher during the pay-to-play era.[1731] The study concluded that, when underwriting firms were routinely able to make political campaign contributions to win underwriting business, gross spreads were significantly higher, but only for those deals that were negotiated that enable conflicted underwriter selection. This may indicate that, absent pay to play rules, offerings subject to conflicts of interest related to political contributions may not always be negotiated at market rates. Pay to play rules may decrease certain costs to municipal entities and their stakeholders, but may increase costs to dealers from greater quality based competition.

[1728] *See* Better Markets (October 2013), *supra* note 5.

[1729] *See, e.g.,* FIA/ISDA/SIFMA, *supra* note 5, Better Markets, *supra* note 5; CFA, *supra* note 5. Also *see* Section II.I *supra*.

[1730] *See* Proposing Release, 76 FR at 42450, *supra* note 3.

Several caveats apply. While the pay to play regime considered in the study above examines the effects of the contribution limits in the 1994 pay to play reforms, and the contribution thresholds in these final rules are comparable in magnitude, we cannot quantify the levels at which certain political contributions by SBS Dealers and their covered associates may give rise to conflicts of interest. However, we note that *de minimis* thresholds in the final rules have been harmonized with existing rules to which Swap Entities and investment advisers are subject. We also note that the effect on spreads quantified above has been estimated around the adoption of the MSRB pay to play rule. These final rules follow pay to play rules adopted by the MSRB, the CFTC and the Commission. In light of extensive cross-market participation and expected dual registration of some entities, the economic effects of these final rules may be smaller than those discussed above, if some SBS Dealers and other market participants have already restructured their business practices in security-based swap markets as a result of existing pay to play rules in other markets.

Finally, the two-year time out may disincentivize direct political contributions to certain officials by SBS Dealers and their covered associates. To the extent that SBS Dealers and covered associates may increase contributions to other entities, such as 501(c) organizations[1732] or independent expenditure committees, which are not subject to these final rules, and to the extent these other expenditures may facilitate ongoing pay to play practices, the above benefits may be reduced.

As a result of the pay to play rule, SBS Dealers will incur costs, including costs of establishing and implementing policies and procedures to monitor the political contributions made by the SBS Dealer and its covered associates. As indicated in Section V, pay to play rules will require collection of information regarding political contributions of SBS Dealers and their covered associates, which may cost up to $3,515,000 for all dealers.[1733] Additionally, as discussed in Section V above, SBS Dealers may incur one-time initial costs to establish or enhance current systems to assist in their compliance with the rule, estimated at up to $5,000,000 for all SBS Dealers.[1734] Compliance costs imposed by the rule are expected to vary significantly among SBS Dealers, depending on, among other things, the number of covered associates and the supervisory structure of the SBS Dealer; the degree to which compliance procedures are automated (such as policies and procedures requiring pre-clearance); and the extent to which the SBS Dealer may already have policies and procedures guiding political contributions under ethics or compliance programs. Smaller SBS Dealers, for example, would likely have a small number of covered associates, and thus expend fewer resources to comply with the proposed rule. However, to the extent that the cost of developing policies and procedures may have a high fixed cost component, smaller SBS dealers may incur costs that represent a higher percentage of net income. Lastly, these costs will be greater for SBS Dealers with multiple layers of supervision and a higher number of covered associates with shorter tenures.

Under the final rules, the two-year time out on SBS dealing with municipal entities is triggered when any of the covered associates has contributed in excess of the *de minimis* thresholds. While developing and implementing policies and procedures related to political contributions and training covered associates may mitigate this risk, some SBS Dealers may still trigger the time out despite these measures due to contributions by one of their covered associates.

Such SBS Dealers will incur costs from the loss of business with municipal entities. We note that the final rules contain a safe harbor for contributions by natural persons that predate the date of becoming a covered associate by more than 6 months, if such associates do not solicit municipal entities on behalf of the SBS Dealer. Further, if the SBS Dealer discovers the triggering contribution under $350 within 4 months and secures a return of funds within 60 days, the prohibition will not apply. In response to commenter concerns,[1735] and consistent with Advisers Act Rule 206(4)–5, the final rules provide up to two such exemptions per year for dealers with 50 or fewer covered associates, and up to three such exemptions for dealers with over 50 covered associates. We do not have data or other information concerning the number of general partners, managing members, executive officers or other persons of similar status and function in SBS Entities; the number of employees that solicit municipal entities to enter security-based swaps with SBS Dealers; SBS Dealer supervisory structures for such employees; or political action committees controlled by such persons or SBS Dealers. However, the Commission has previously estimated that as many as 423 natural persons may associate with each SBS Dealer.[1736] Therefore, we believe that many SBS Entities are likely to be able to take advantage of up to 3 annual exemptions against inadvertent violations described above.

The final rules also allow SBS Dealers to file applications for exemptive relief, and outline a list of items to be addressed, including, whether the SBS Dealer has developed policies and procedures to monitor political contributions; the steps taken after discovery of the contribution; and the apparent intent in making the contribution based on the facts and circumstances of each case. These safe harbors, combined with the ability to apply for exemptive relief, may partly mitigate the direct and indirect costs of SBS Dealers triggering the timeout and being precluded from dealing with municipal entities.

[1731] *See* Alexander W. Butler, Larry Fauver, and Sandra Mortal, Corruption, Political Connections, and Municipal Finance, 22 The Review of Financial Studies 28–73 (2009).

In a theoretical model by Cotton (2012), contributions may increase access but not necessarily improve outcomes for some agents, while contribution limits decrease rent extraction and may encourage more evidence disclosure. *See* C. Cotton, Pay-to-play Politics: Informational Lobbying and Contribution Limits When Money Buys Access, 96 Journal of Public Economics 369–386 (2012).

[1732] *See, e.g., McCutcheon* v. *Federal Election Commission,* 134 S.Ct. 1434, 1460 (2014).

[1733] Initial cost: (In-house attorney at $380 per hour) × 9,250 hours = $3,515,000. This figure may overestimate the initial cost burden on some SBS Dealers if some of the functions are performed by in-house compliance managers instead of in-house attorneys.

[1734] In the Advisers Act pay to play rule, the Commission estimated that firms with over 15 covered associates incur, on average, $100,000 startup costs. Assuming all SBS Dealers will have over 15 covered associates, the initial cost is estimated at: 50 SBS Dealers × $100,000 = $5,000,000. *See* Advisers Act Pay-to-Play Release, *supra* note 1100 (adopting Advisers Act Rule 206(4)–5)).

[1735] FIA/ISDA/SIFMA, *supra* note 5.

[1736] *See* Rule of Practice 194 Proposing Release, 80 FR at 51710.

As discussed in Section V, the incidence of exemptive relief related to MSRB Rule G–37 and the number of applications the Commission has received under the Adviser's act pay to play rules may be indicative of possible applications for exemptive relief under these final rules. Recognizing that this is an estimate, we conservatively estimate that the Commission may receive up to two applications for exemptive relief per year with respect to pay to play rules,[1737] at a total ongoing cost of $25,600 per year.[1738]

Costs of compliance with the final pay to play rules may be recovered by SBS Dealers in the form of higher costs of security-based swaps offered to municipal entities. If the costs are significant and cannot be fully recovered from counterparties some SBS Dealers may limit their security-based swap transactions with municipal entities and reduce their access to OTC security-based swaps. However, the pay-to-play rules do not apply to security-based swaps executed on national registered exchanges or SEFs, where the security-based swap dealer does not know the identity of the counterparty to the transaction at a reasonably sufficient time prior to execution to permit the security-based swap dealer to comply. Therefore, municipal entities will retain access to more liquid and standardized security-based swaps executed on SEFs or registered national exchanges, and will continue to be able to rely on security-based swaps as a tool for risk mitigation.

Once SBS Dealers have to comply with the rule, to the extent that SBS Dealers currently engaging in pay to play practices enjoy a competitive advantage over SBS Dealers that are not, they may lose some of their business with municipal entities and related profits. However, other SBS Dealers that do not currently engage in pay to play practices may win business, and SBS Dealers may begin to seek competitive advantages through lower transaction costs, more customized security-based swaps, or superior execution, benefitting municipal entity counterparties.

If some SBS Dealers currently intermediating a significant volume of transactions with municipal entities trigger the two-year time out, it could limit the number of SBS Dealers able to offer to enter into or enter into security-based swaps with municipal entities. However, the lost market share is likely to be picked up by other SBS Dealers. The presence and direction of any economic effects would depend on the number of SBS Dealers that trigger the time outs; the market power of the prohibited SBS Dealers; the market power of SBS Dealers that may be able to step in; and the importance of bilateral relationships. Further, municipal entities will continue to have unconstrained access to security-based swaps transacted through SEFs or registered national security exchanges.

The Commission recognizes that these rules impose restrictions on persons that can represent special entities in security-based swap transactions of special entities with SBS Entities. As discussed in Section II.H.6.f, under Rule 15Fh–5(a)(1)(vi), qualified independent representatives of special entities must be subject to pay to play rules of the Commission, the CFTC or an SRO, except where the independent representative is an employee of the special entity. If special entities currently rely on advisors not subject to pay to play rules, or do not rely on independent advisors in their transactions with SBS Entities in security-based swaps, they will incur costs related to retaining qualified independent representatives. These costs will depend on the type of advisor search the special entity would choose to perform, the special entity's ability to delegate such functions to current employees, and labor market conditions for qualified independent representatives. Table 2 of the economic baseline shows that the overwhelming majority of special entities transact through SEC registered investment advisers already subject to similar pay to play rules under the Adviser's Act. Special entities that do not transact through SEC registered investment advisers likely rely on municipal advisors subject to MSRB rules or employees in their transactions with SBS Entities. While we have no data or other information to enable us to identify what fraction of advisors representing special entities would meet the qualified independent representative requirements of these final rules, the above considerations indicate that costs of pay to play rules for independent representatives of special entities may be mitigated.

However, the Commission recognizes that, to the extent that some representatives currently intermediating special entity transactions with SBS Entities would be prohibited from advising special entities under these final rules, some representatives may incur costs related to loss of business, and competition among qualified independent representatives of special entities may decrease. At the same time, representatives prohibited from such activities under these final rules may seek to register as SEC registered investment advisers, MSRB registered municipal advisors or special entity employees, becoming subject to pay to play rules referenced in Rule 15Fh–5(a)(1)(vi) and continuing to represent special entities in compliance with these final rules. Therefore, the overall effect of pay to play rules on competition among qualified independent representatives of special entities is unclear.

As a result of the two-year time out and other pay to play requirements, SBS Dealers transacting with municipal entities, as well as covered associates of SBS Dealers, may be less likely to make certain political contributions and payments to political parties at or above *de minimis* thresholds. This may result in a decrease in funding by SBS Dealers and their covered associates for such campaigns through direct contributions and political action committees. However, to the extent that the two-year time out may disincentivize direct contributions, SBS Dealers and covered associates may turn to other avenues of political speech, such as contributing unlimited amounts to 501(c) organizations or independent expenditure committees, which are not required to disclose donors and are not prohibited under these final rules.[1739] Therefore, the overall effect of these final rules on the aggregate volume of political contributions by SBS Dealers and their covered associates to campaigns is unclear.

As clarified in Section II, the Commission is adopting an approach, under which these prohibitions will not be triggered for an SBS Dealer or any of its covered associates by contributions made before the SBS Dealer registered with the Commission as such. We also note that these prohibitions will not apply to contributions made before the compliance date of the rule by newly covered associates to which the look back applies. At the same time, if individuals who later become covered associates make a triggering contribution on or after the compliance date of this rule, the contribution would trigger the two-year time out if it were made less than, as applicable, six months or two years before the individual became a newly covered associate.

[1737] FINRA has granted 17 exemptive letters related to Rule G–37 between 1/2005 and 12/2015 (11 years) *http://www.finra.org/industry/exemptive-letters*. As of 1/2016 there were 665 SEC registered muni advisers *http://www.sec.gov/help/foia-docs-muniadvisorshtm.html*. Using these figures, we obtain an estimate of (17 applications/11 years) × (50 SBS Dealers/665) = 0.117 applications per year.

In addition, the Commission has received 13 applications under the Adviser's act (since the compliance date, approximately 4 years). As of 2/2016 there were 11,959 registered investment advisers filing form ADV *https://www.sec.gov/foia/docs/invafoia.htm*. Using these figures, (13 applications/4 years) × (50 SBS Dealers/11,959) = 0.014 applications per year.

[1738] Ongoing cost: (Outside counsel at $400 per hour × 32 hours per application × 2) = $25,600.

[1739] *See, e.g., McCutcheon* v. *Federal Election Commission,* 134 S.Ct. 1434, 1460 (2014).

We have also considered the alternative, under which dealers would enjoy a safe harbor where the municipal entity is represented by a qualified independent representative, as proposed by one commenter.[1740] Such an alternative would lower the scope of entities and transactions affected by the pay to play prohibitions. As discussed in earlier sections and discussed in the economic baseline, approximately 98% of special entities rely on investment advisers in their CDS transactions. While we do not have data or information allowing us to conclude whether these investment advisers would be considered independent qualified representatives under our final rules, this alternative has the potential to substantially reduce the scope of application of the pay to play rules. While this may reduce direct and indirect costs of pay to play rules for SBS Dealers, this may also reduce their benefits, if qualified independent advisor representation does not fully resolve conflicts of interest related to prohibited political contributions by SBS Dealers and covered associates.

Finally, we have considered the alternative of increasing or decreasing the number of exemptions for inadvertent violations. The ability of SBS Dealers to cure reduces the risk that some SBS Dealers may trigger a two-year timeout as a result of inadvertent violations due to prohibited contributions by covered associates, related losses, and potential adverse effects on competition and market liquidity. At the same time, increasing the number of automatic exceptions available to SBS Dealers decreases their incentives to monitor their and their covered associates' political contributions, and may facilitate ongoing pay to play practices. We also note that, under the rules being adopted, in addition to such automatic exceptions, SBS Dealers would be able to apply with the Commission for exemptive relief.

We do not have data or any other information concerning the sizes, donors and recipients of political contributions of entities that may trigger SBS Dealer registration and covered associates. No such information is publicly available, and commenters did not provide data enabling such quantification. Therefore, we cannot quantify the magnitude of the above effects.

8. Scope

a. Inter-Affiliate Transactions

The final business conduct rules are designed to facilitate counterparty protections, reduce information asymmetries, and enable Commission oversight. However, as discussed in Sections V and VI above, these final rules impose direct and indirect compliance costs, and may erode SBS Entities' profitability of dealing in security-based swaps, which may reduce the incentive for dealers to intermediate SBS transactions and provide liquidity to end users. We recognize, however, that some market participants, such as complex and diversified corporations or institutions, may in the regular course of business enter into inter-affiliate security-based swaps to manage risk inside a corporate group or to transfer risk to a treasury department or central affiliate.

When the economic interests of those affiliates are aligned adequately, as would be found in the case of majority-ownership, such security-based swaps serve to allocate or transfer risks within an affiliated group, rather than to move those risks out of the group to an unaffiliated third party. Therefore, the application of these final business conduct rules to security-based swaps that SBS Entities enter into with majority-owned affiliates is unlikely to yield enhanced counterparty protections as discussed above. At the same time, SBS Entities would incur costs related to compliance with these final rules for such transactions. Therefore, the exclusion of such transactions may avoid costs that are less likely to be offset by the economic benefits considered above. Further, the CFTC excludes such swaps from substantive business conduct requirements for Swap Entities. Imposing these rules with respect to such security-based swaps would increase the relative costs of transacting in security-based swap markets, including single-name CDS, and swap markets, including index CDS. Such an approach may fragment an otherwise integrated market and could lead to a flight of liquidity to swap markets, with follow on effects on market liquidity and price discovery. As indicated earlier, Rule 15Fh–1(a) specifies that security-based swaps that SBS Entities enter into with the majority-owned affiliates will be excluded from Rules 15Fh–3(a) through 15Fh–3(f), 240.15Fh–4(b) and 240.15Fh–5. We note that CCO and supervision rules will continue to apply to dealers engaging in such swaps.

b. Opt Out

These final rules are intended to strengthen counterparty protections, reduce informational asymmetries between SBS Entities and their counterparties, and enhance Commission oversight over security-based swap markets. We recognize the inherent heterogeneity in the level of general sophistication and informedness specific to security-based swaps of various counterparties of SBS Entities, as suggested by some commenters.[1741] The final rules do not allow counterparties of SBS Entities to opt out from some or all of the substantive business conduct requirements, such as disclosures of material characteristics, risks, conflicts of interest, incentives and clearing rights; suitability assessments or pay to play rules. As a result, more sophisticated and better informed counterparties of SBS Entities may enjoy few benefits, but may incur costs from these final rules.

The final rules reflect these competing considerations through a reliance on representations approach, and in safe harbors and alternatives, such as the institutional suitability alternative for customer-specific suitability and the independent advisor safe harbor for SBS Entities advising special entities. Further, some of the requirements, such as pre-trade disclosures of material incentives, risks and characteristics, will not apply to counterparties that are themselves SBS or Swap Entities. Yet other rules impose requirements on SBS Dealers, but not on Major SBS Participants, recognizing the central role of dealers as intermediaries in security-based swap markets. Finally, as discussed throughout the release, many of these final business conduct requirements are harmonized with CFTC and FINRA conduct rules, which do not allow counterparties to opt out of these or similar protections.

We also note that if counterparties are able to opt-out of some or all of the substantive requirements, SBS Entities may have an incentive to require opt-out of these final rules prior to transacting with their counterparties, or cease business with such counterparties. This effect is more likely to be present for SBS Entity—counterparty relationships, in which counterparties have the least bargaining power, such as less sophisticated counterparties that do not regularly access security-based swap markets, do not have established relationships with multiple dealers, and engage in low volumes of security-based swap activity. This may result in smaller, less sophisticated and less informed counterparties, which are ex ante most likely to benefit from the disclosures and protections in these final rules, opting out of business conduct rules or risking the loss of access to OTC security-based swaps if opt out was permitted. However, we recognize that the ability of counterparties to opt out of these final rules would give such entities greater flexibility in structuring their relationships with SBS Entities relative to the approach being adopted, and allow them to trade off the benefits of counterparty protections and information benefits of these final rules against potentially greater costs and lower liquidity in SBS Entity intermediated OTC security-based swaps under these final business conduct standards.

[1740] *See* SIFMA (August 2011), *supra* note 5.

[1741] *See, e.g.*, CalSTRS, *supra* note 5.

Finally, these economic considerations are attenuated by the fact that many of the final rules are not applicable to if the SBS Entity does not know the identity of the counterparty at a reasonably sufficient time prior to the execution of the transaction to permit the SBS Entity to comply with the obligations of the rule and, in certain instances, the transaction is executed on a registered national exchange or a registered or exempt SEF.

9. Cross-Border Application

As the Commission has indicated in other releases,[1742] security-based swap markets are global, and market data presented in the economic baseline demonstrates extensive cross-border participation in security-based swap markets. For instance, Figure 1 shows that, based on DTCC–TIW data for 2014, approximately half of all new accounts participating in the market are accounts with a domicile outside the U.S. Viewed from the perspective of the domiciles of the counterparties booking credit default swap ("CDS") transactions, approximately 48 percent of price forming North American corporate single-name CDS transactions from January 2008 to December 2014 were cross-border transactions between a U.S.-domiciled counterparty and a foreign-domiciled counterparty, and an additional 40 percent of such CDS transactions were between two foreign-domiciled counterparties (see Figure 3). Thus, only 12 percent of the global transaction volume by notional volume between 2008 and 2014 was between two U.S.-domiciled counterparties, using registered office location of the TIW accounts to identify domiciles. Together, these data indicate that cross-border transactions are a common feature of dealing activity in the security-based swap market.

Further, SBS Dealers and other counterparties are highly interconnected, with most dealers transacting with hundreds of counterparties, and most non-dealers transacting with several dealers.[1743] The global scale of the security-based swap market allows counterparties to access liquidity across jurisdictional boundaries, providing market participants with opportunities to share these risks with counterparties around the world. Because dealers facilitate the great majority of security-based swap transactions, with bilateral relationships that extend to potentially thousands of counterparties, deficiencies in SBS Dealer disclosures, recommendations of unsuitable security-based swaps, and informational asymmetries may affect a large number of counterparties and have potentially significant cross-border implications.

a. Scope of Application to SBS Entities

As discussed in Section III, business conduct requirements fall into two categories: Entity-level business conduct requirements, such as CCO rules and supervision, and transaction-level requirements, such as disclosure and suitability. The final rules create certain exceptions from application of the transaction-level business conduct requirements to registered SBS Dealers and Major SBS Participants in certain transactions. With respect to SBS Dealers, these transaction-level requirements will apply to any transaction that constitutes an SBS Dealer's U.S. business but not to any transaction that constitutes its foreign business. For U.S. SBS Dealers, U.S. business includes all of their transactions, except for certain transactions conducted through a foreign branch. For foreign SBS Dealers, U.S. business includes all of their transactions with U.S. persons (except for certain transactions conducted through a foreign branch of a U.S.-person counterparty) and transactions captured by the U.S. Activity Test (*i.e.*, transactions with another non-U.S. person that the foreign SBS Dealer arranges, negotiates, or executes using personnel located in a U.S. branch or office).

The final rule creates a slightly different exception for Major SBS Participants. U.S. Major SBS Participants must comply with the business conduct requirements in all their transactions, except for certain transactions conducted through a foreign branch, and foreign Major SBS Participants must comply with the requirements in their transactions with U.S. persons, except for certain transactions conducted through a foreign branch. Under the final rule, the exception for foreign Major SBS Participants does not incorporate a U.S. Activity Test.

In considering the economic effects of this cross-border approach, we recognize that the economic baseline reflects markets as they exist today, in which compliance with business conduct standards for security-based swaps is not required. Therefore, these final business conduct rules will apply with respect to security-based swap transactions intermediated by SBS Entities where they currently do not. Under Exchange Act Section 15F, these requirements apply to registered SBS Entities by virtue of their registration with the Commission and, in the absence of any exceptions to the requirements, would apply to all business of a registered SBS Entity. However, final Exchange Act rules 3a71–3(c) and 3a67–10(d) create certain exceptions, as described above, that limit the application of these requirements to a subset of the transactions of a registered SBS Entity. For example, a foreign SBS Dealer transacting with a foreign counterparty will not be subject to Title VII transaction-level business conduct requirements if the foreign SBS Dealer does not rely on personnel located in the United States to arrange, negotiate or execute the swap, including with respect to transactions in which the foreign SBS Dealer's counterparty may have relied on personnel located in the United States.

However, we recognize that the inclusion of the U.S. Activity Test in the definition of "U.S. business" for foreign dealers may increase the set of transactions that will be required to comply with these final business conduct rules, relative to the alternative under which foreign dealers transacting with foreign counterparties are not subject to these final rules. We also recognize that capturing transactions of foreign SBS Entities with U.S. persons may increase the set of transactions subject to the final business conduct rules as compared to the alternative of not capturing such transactions.

[1742] *See, e.g.*, Cross-Border Adopting Release, 79 FR at 47280, *supra* note 684; U.S. Activity Proposing Release, 80 FR at 27454.

[1743] Based on an analysis of 2014 DTCC–TIW transaction data, accounts likely to register with the Commission as SBS Dealers have on average 759 unique counterparties (a median of 453 unique counterparties). All other accounts (*i.e.*, those more likely to belong to non-dealers) averaged four unique counterparties (a median of three counterparties).

The final cross-border approach to the scope of the final business conduct requirements may produce several benefits. First, classifying certain rules, such as diligent supervision and CCO rules, as entity-level requirements that apply to the entire security-based swap business of the registered SBS Entity may facilitate Commission oversight of registered SBS Entities and enhance compliance with federal securities laws and Commission rules. For example, as discussed in Section III and in the Cross-Border Proposing Release, supervision and CCO rules are aimed at mitigating conflicts of interest and enhancing compliance with securities laws, rules and regulations thereunder by the entire registered SBS Entity. The Commission continues to recognize that relevant conflicts of interest and non-compliance may arise as a result of transactions comprising an SBS Entity's foreign business. Further, we note that CCO duties include establishing, maintaining, and reviewing policies and procedures reasonably designed to ensure compliance with applicable Exchange Act requirements that apply to the SBS Entity as a whole. As discussed in Section III, the Commission is applying diligent supervision and CCO duties rules at the entity level.

Second, by imposing transaction-level requirements on transactions of SBS Entities with U.S.-person counterparties, subject to a tailored foreign branch exception, these final rules result in disclosure, suitability, fair and balanced communications and special entity requirements, among others, applying to transactions that are particularly likely to raise the types of counterparty protection and other concerns addressed by Title VII business conduct requirements, whether carried out by U.S. or foreign SBS Entities. Specifically, this approach to security-based swap transactions between registered SBS Entities and U.S. persons may potentially enhance the expected counterparty protection, reduce information asymmetry, and facilitate Commission oversight benefits of these final rules to the U.S. security-based swap market.

Third, requiring registered foreign SBS Dealers (but not Major SBS Participants) to comply with business conduct requirements with respect to any transaction with another non-U.S.-person counterparty that the foreign SBS Dealer arranges, negotiates, or executes using personnel located in the United States will facilitate more uniform regulatory treatment of the security-based swap activity of registered SBS Dealers operating in the United States, mitigating potential competitive distortions.[1744] Although applying other business conduct frameworks (such as broker-dealer regulation) to this activity may achieve similar regulatory goals, the availability of exceptions, exclusions and safe harbors may mean that alternative frameworks may not apply to certain business structures used by registered SBS Dealers to carry out their business in the United States.[1745] Moreover, these alternative frameworks may apply only to the U.S. intermediary of the foreign SBS Dealer and not to the SBS Dealer itself. These final rules will avoid these differences in application, along with the potential competitive disparities they may create, by subjecting all registered SBS Dealers engaged in transactions captured by the U.S. Activity test to the same business conduct framework, including, among others, disclosure, suitability, and fair and balanced communication rules. Applying business conduct rules to all security-based swap trades arranged, negotiated or executed by personnel located in the U.S. also may reduce disparities between U.S. and foreign SBS Dealers competing for business with the same foreign counterparties.

We recognize that foreign SBS Dealers transacting with foreign counterparties may be subject to foreign regulations in addition to these final rules, giving rise to potentially duplicative compliance costs, pointed out by commenters.[1746] However, as discussed in Section III above, the Commission believes that requiring registered foreign SBS Dealers to comply with the transaction-level business conduct requirements with respect to these transactions may enhance transparency, strengthen counterparty protections, and integrity of the U.S. security-based swap market.

Moreover, the Commission is adopting a framework that would potentially permit foreign SBS Dealers to satisfy their requirements with respect to certain of the business conduct requirements by complying with comparable requirements of a foreign jurisdiction. Therefore, foreign SBS Dealers engaged in U.S. Activity may be able to comply with these final rules by complying with foreign jurisdictions' rules and regulations, to the extent that the Commission makes substituted compliance determinations and the other prerequisites to substituted compliance have been satisfied. This may mitigate the potential for conflicting requirements and duplication in compliance costs. We recognize that there will be limits to the availability of substituted compliance, including the possibility that substituted compliance may be permitted with regard to some requirements and not others, or that, in certain circumstances, substituted compliance may not be permitted with respect to any requirements with regard to a particular jurisdiction depending on our assessment of the comparability of the relevant foreign requirements and the availability of supervisory and enforcement arrangements among the Commission and relevant foreign financial regulatory authorities. However, the Commission does not believe it would be appropriate to permit foreign security-based swap dealers to satisfy these final business conduct requirements by complying with foreign requirements when the prerequisites to substituted compliance have not been satisfied.[1747]

As we noted earlier, these rules limit the scope of application of these final business conduct requirements by excluding certain transactions of registered foreign and U.S. SBS Entities from the requirements. However, as we have also noted, relative to the baseline, final Exchange Act rules 3a71–3(c) and 3a67–10(d), together with the substantive rules being adopted in this release, should result in an increase in costs and benefits from the baseline. Specifically, the final approach to cross-border application of the final business conduct rules may increase assessment and programmatic costs of registered SBS Dealers, but may also increase related counterparty protections, reduce informational asymmetries and enhance Commission oversight.

[1744] We recognize that, depending on the business structure that a registered U.S. or foreign SBS Dealer employs, an intermediary (such as an agent that is a registered broker-dealer) may already be subject to certain business conduct requirements with respect to the SBS Dealer's counterparty in the transaction. However, we continue to believe that it may be important that registered SBS Dealers themselves are subject to these final business conduct requirements with respect to security-based swap transactions that are part of their U.S. business. Because SBS Dealers and their agents may allocate between themselves specific responsibilities in connection with these business conduct requirements, to the extent that these requirements overlap with requirements applicable directly to the agent (for example, in its capacity as a broker), and the SBS Dealer allocates responsibility for complying with relevant requirements to its agent, we expect any increase in costs arising from the proposed rules may be mitigated.

[1745] For example, Exchange Act section 3(a)(4)(B) excepts banks from the definition of "broker" with respect to certain activity.

[1746] *See, e.g.,* IIB (July 2015), *supra* note 10; ISDA (July 2015), *supra* note 10; SIFMA–AMG (July 2015), *supra* note 10; SIFMA/FSR (July 2015), *supra* note 10, commenting on the U.S. Activity Proposing Release.

[1747] *See* Section III, *supra.*

With respect to assessment costs, registered SBS Entities likely will establish systems to identify transactions that are subject to the business conduct requirements. Foreign SBS Entities will need to establish systems to identify transactions with U.S. persons (including whether the transaction is conducted through a foreign branch of that person), and foreign SBS Dealers will need to establish systems to identify transactions falling within the U.S. Activity Test. Similarly, U.S. SBS Entities will incur additional assessment costs related to identifying their own transactions conducted through a foreign branch, including such transactions with U.S.-person counterparties that constitute transactions conducted through a foreign branch of those U.S.-person counterparties. Most of the assessment costs with respect to analysis and systems to track transactions have been evaluated in connection with other Commission rules; therefore, our economic baseline includes all registered SBS Entities have those systems in place. For instance, in the Cross-Border Adopting Release, the Commission estimated foreign SBS Entity assessment costs with respect to systems tracking transactions with U.S. persons for purposes of counting transactions toward the major security-based swap participant position thresholds and the security-based swap dealer *de minimis* thresholds.[1748]

Similarly, in the U.S. Activity Adopting Release, the Commission evaluated the assessment costs to SBS Dealers related to including transactions falling within the U.S. Activity Test in a non-U.S. person's dealer *de minimis* requirements.[1749] Once registered, these SBS Entities will be able to use these systems in connection with identifying whether a transaction is subject to the transaction-level business conduct requirements.

However, in addition to these previously evaluated costs, U.S. SBS Entities conducting business through a foreign branch will need to classify their counterparties and transactions to determine whether business conduct transaction-level requirements apply. We believe that the costs to a U.S. SBS Entity of creating systems to identify transactions it conducts through a foreign branch with U.S.-person counterparties and to determine whether any such transactions are conducted through the foreign branch of its U.S.-person counterparties may be similar to costs associated with the systems that foreign persons are likely to establish to perform the dealer *de minimis* or major participant threshold calculations. In both cases such systems would have to flag a person's security-based swaps against the specific criteria embedded in the final rules. Based on the methodology set out in the Cross-Border Adopting Release for estimating costs of systems designed to identify similar criteria,[1750] we estimate these assessment costs may include one-time programming costs of $14,904 and ongoing annual costs of $16,612 per SBS Entity.[1751] Based on a review of DTCC–TIW data relating to single-name CDS activity in 2014, we estimate that up to 5 U.S. SBS Dealers conducted dealing activity through foreign branches, and we conservatively estimate that there may be as many as 5 U.S. Major SBS Participants. Assuming that all ten of these U.S. SBS Entities elected to establish a system to identify transactions conducted through a foreign branch or conducted through the foreign branch of their U.S. counterparties, the total assessment costs associated with our final business conduct rules would be approximately $149,040 in one-time annual programming costs and $166,120 in ongoing annual costs.[1752]

As recognized in Section III above, SBS Entities would be permitted to rely on certain representations provided to them by their U.S. bank counterparties regarding whether a transaction is conducted through a foreign branch. Initial costs to the U.S. bank counterparties of developing related representations are estimated at $195,000.[1753] Aggregate ongoing costs to the U.S. bank counterparties of representations are estimated at approximately $190,000 per year.[1754]

[1748] *See* Cross-Border Adopting Release, 79 FR 47332–34 (evaluating foreign SBS Dealer assessment costs with respect to systems tracking transactions with U.S. persons); *id.* at 47353–54 (evaluating foreign Major SBS Participant assessment costs with respect to systems tracking transactions with U.S. persons). In that release, the foreign branch exception applied only to U.S. banks that were themselves registered SBS Dealers, and our evaluation of analysis costs borne by such persons were based on a system that would evaluate whether a counterparty was a U.S. person, whether that counterparty was transacting through a foreign branch, and whether that counterparty was a registered SBS Dealer, among other things. *See, e.g.,* Cross-Border Adopting Release, 79 FR 47353. Because the analysis to determine whether the transaction-level business conduct requirements apply in a transaction by a foreign SBS Entity with a U.S. person involve only a determination whether the counterparty is a U.S. person and whether it is transacting through a foreign branch, we believe that the system whose costs were estimated in these prior releases should be sufficient for the analysis required by foreign SBS Entities under these rules.

[1749] *See* U.S. Activity Adopting Release, 81 FR 8627 (evaluating assessment costs to SBS Dealers with respect to systems for tracking transactions arising from U.S. activity).

[1750] *See* Cross-Border Adopting Release, 79 FR 47332, note 681. See also Definitions Adopting Release, 77 FR 30734–35, note 107.

[1751] In the Definitions Adopting Release, we estimated that the one-time programming costs of $13,692 per entity and annual ongoing assessment costs of $15,268. *See* Definitions Adopting Release, 77 FR 30734–35, and accompanying text (providing an explanation of the methodology used to estimate these costs). The hourly cost figures in the Definitions Adopting Release for the positions of Compliance Attorney, Compliance Manager, Programmer Analyst, and Senior Internal Auditor were based on data from SIFMA's Management & Professional Earnings in the Securities Industry 2010.

For purposes of the cost estimates in this release, we have updated these figures with more recent data as follows: The figure for a Compliance Attorney is $334/hour, the figure for a Compliance Manager is $283/hour, the figure for a Programmer Analyst is $220/hour, and the figure for a Senior Internal Auditor is $209/hour, each from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. We also have updated the Definitions Adopting Release's $464/hour figure for a Chief Financial Officer, which was based on 2011 data, with a revised figure of $500/hour, for a Chief Financial Officer with five years of experience in New York, that is from *http://www.payscale.com*, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See http://www.payscale.com* (last visited Apr. 16, 2014).

Incorporating these new cost figures, the updated one-time programming costs based upon our assumptions regarding the number of hours required in the Definitions Adopting Release would be $14,904 per entity, *i.e.,* (Compliance Attorney at $334 per hour for 2 hours) + (Compliance Manager at $283 per hour for 8 hours) + (Programmer Analyst at $220 per hour for 40 hours) + (Senior Internal Auditor at $209 per hour for 8 hours) + (Chief Financial Officer at $500 per hour for 3 hours) = $14,904, and the annual ongoing costs would be $16,612 per entity, *i.e.,* ((Senior Internal Auditor at $209 per hour for 16 hours) + Compliance Attorney at $334 per hour for 4 hours) + (Compliance Manager at $283 per hour for 4 hours) + (Chief Financial Officer at $500 per hour for 4 hours) + (Programmer Analyst at $220 per hour for 40 hours) = $16,612).

[1752] One-time annual programming cost: $14,904 × 10 U.S. SBS Entities = $149,040. Ongoing annual cost: $16,612 × 10 U.S. SBS Entities = $166,120.

[1753] Initial cost: Outside counsel $100,000 + ((Attorney at $380 per hour) × 250 hours = $95,000) = $195,000).

[1754] Ongoing cost: (In-house attorney at $380 per hour) × 500 hours = $190,000.

This scope of transactions subject to business conduct requirements may also affect the programmatic costs incurred by participants in security-based swap markets. For entities already required to register as SBS Entities under current rules, this rule may increase the set of transactions and counterparties to which they must apply business conduct requirements, relative to the baseline under which no business conduct requirements apply. We continue to recognize that requiring compliance of foreign SBS Dealers transacting with foreign counterparties where transactions were arranged, negotiated or executed by personnel located in the United States may discourage reliance by foreign SBS Entities on personnel located in the United States. Some foreign SBS Dealers transacting with foreign counterparties may choose to relocate their personnel outside of the United States, or replace personnel located in the United States with personnel not located in the United States to avoid compliance with these final rules. To the extent that these final rules may increase the costs of foreign SBS Entities, or influence competition between U.S. and foreign SBS Dealers, the terms of security-based swaps intermediated by foreign SBS Dealers may deteriorate and foreign SBS Dealers may become less willing to intermediate security-based swap transactions. The approach taken in this rule may mitigate some of the commenter concerns with the initial proposal by focusing only on the location of the foreign dealer's or its agent's market-facing personnel, and not the location of its counterparties' activity.[1755] Further, these final rules allow for the possibility of substituted compliance for foreign SBS Dealers, including in connection with their security-based swap activity with foreign counterparties. Therefore, as discussed above, these costs may be incurred primarily by foreign SBS Entities subject to less stringent business conduct rules in their foreign jurisdictions, where the ex-ante benefits of these final rules may be greater.[1756]

The Commission has received comment that this approach to the application of business conduct requirements may impose costs of additional disclosures and representations on asset managers servicing foreign clients.[1757] As we noted in Section III, these final rules do not apply directly to asset managers, and asset managers will incur no liability under these rules. However, we recognize that SBS Entities may have certain expectations of asset managers in connection with the transactions involving funds. Depending on how SBS Entities and asset managers choose to allocate these responsibilities, asset managers may incur some fraction of the costs estimated above. The commenter also argued that the final rules may result in asset managers separating block trades for U.S. and non-U.S. persons, for whom business conduct eligibility has not been verified, and obtaining assurances that the dealer's personnel arranging, negotiating or executing block trades for non-U.S. persons is not based in the U.S. We recognize that, to the extent this affects the ability of asset managers to find counterparties to block trades with non-U.S. persons or the costs of doing so, liquidity may become fragmented and execution price of certain block trades may be adversely affected. We note that some asset managers may be complying with similar requirements, such as those under the Exchange Act and FINRA rules applicable to U.S. broker-dealers related to transactions in cash securities that these broker-dealers intermediate on behalf of foreign brokers.

We have considered the alternative of applying business conduct rules to all security-based swap transactions of all registered SBS Entities. This approach would increase the scope of transactions subject to these substantive rules, increasing programmatic costs of compliance by registered SBS Entities—costs that are likely to be passed on to counterparties. Under the rules being adopted, the U.S. business of foreign SBS Dealers excludes transactions conducted through a foreign branch. Further, the final rule provides for an exception from the transaction-level business conduct requirements when a foreign Major SBS Participant (or a U.S. Major SBS Participant in a transaction conducted through its foreign branch) enters into a transaction with a foreign branch of a U.S. person.

To the extent that potential losses on security-based swap transactions may flow from foreign branches of U.S. persons to the U.S. business of U.S. persons, excluding transactions of foreign SBS Dealers with foreign branches of U.S. persons from the definition of U.S. business may increase risks to U.S. persons and impact the integrity of U.S. markets. However, compliance with business conduct requirements with respect to security-based swap transactions between foreign SBS Entities and foreign branches of U.S. persons would further increase costs of foreign SBS Entities. Such costs may be passed along to foreign branches of U.S. persons in the form of higher transaction costs or reduced access to security-based swap transactions with foreign SBS Entities.[1758] We lack data regarding the reliance of U.S. persons on foreign branches for their security-based swap activity with foreign SBS Dealers, current business conduct practices of foreign SBS Dealers in their relationships with foreign branches of U.S. persons, and the value of bilateral relationships for this group of market participants. Therefore, we are unable to quantify these effects. However, the approach being adopted recognizes these competing risk and access considerations.

The Commission has also considered the alternative of applying these final business conduct rules to all transactions that a U.S. SBS Entity enters into, including any transaction conducted through its foreign branch. Importantly, the definition of "transactions conducted through a foreign branch" requires the transaction to be arranged, negotiated or executed in the foreign branch.[1759] The activities of foreign branches of U.S. SBS Dealers relying on foreign personnel transacting with foreign counterparties may not pose the same compliance and counterparty risks in U.S. markets as those addressed by these final business conduct requirements. As a result, this alternative may produce fewer intended benefits associated with these final rules, but would increase costs of U.S. SBS Dealers transacting with foreign counterparties.

The Commission has also considered the alternative of excepting all transactions of a foreign SBS Dealer with non-U.S. persons, including transactions that involve U.S. activity. We recognize that the alternative would decrease the set of transactions subject to the final business conduct rules, reducing both assessment and programmatic costs to foreign SBS Dealers, and expected programmatic benefits of these final rules discussed above. Data on North American corporate single name CDS market in Figure 3 of the economic baseline suggest that activity among non-U.S. domiciled accounts represents as much as 17% (if we use the domicile of a corporate group) to 40% (if we use registered office location) of global notional volume, and potentially a larger percentage if firms restructure their business in response to such an exception. We do not currently have data on which of those trades are arranged, negotiated or executed by U.S. personnel of foreign SBS Dealers. However, we note that the U.S. Activity Test in these final rules will subject some foreign SBS Dealer transactions with foreign counterparties to these business conduct rules. Therefore, this alternative would reduce the scope of activity subject to the transaction-level requirements of these final rules, and their resulting costs and benefits, relative to the approach being adopted.

[1755] *See* U.S. Activity Adopting Release, 81 FR 8634.

[1756] *See, e.g.,* SIFMA–AMG (July 2015) *supra* note 10 and ISDA (July 2015), *supra* note 10, on the U.S. Activity Proposing Release.

[1757] *See* SIFMA–AMG (July 2015), *supra* note 10, at 4.

[1758] *See* Cross-Border Adopting Release, 79 FR at 47343, *supra* note 684.

[1759] *See* Exchange Act Rule 3a71–3(a)(3).

In addition, this alternative could put U.S. SBS Entities at a competitive disadvantage due to higher direct and indirect costs related to these final business conduct rules when dealing with foreign counterparties. This approach may also incentivize U.S. SBS Dealers to restructure to be considered a non-U.S. person, while continuing to rely on personnel located in the United States to negotiate, arrange or execute security-based swap transactions with their foreign counterparties. As recognized above, we understand security-based swap markets to be global, and we expect registered SBS Dealers transact across multiple jurisdictions. This alternative may involve potentially significant frictions to cross-border transaction activity and may lead to fractioned liquidity and participation in otherwise globally integrated markets. The approach being adopted may reduce incentives to engage in such restructuring by requiring that foreign SBS Dealers comply with transactional business conduct requirements even when transacting with another non-U.S. person where such security-based swap transactions are arranged, negotiated or executed by personnel located in the United States.

Finally, we have considered an alternative approach that would limit the scope of application of these final business conduct rules to transactions between registered SBS Entities and U.S. person counterparties. This alternative would exclude transactions between U.S. as well as non-U.S. SBS Dealers and their foreign counterparties, which may significantly decrease the scope of application and potential economic effects of these final rules.

First, excluding transactions between U.S. SBS Dealers and their foreign counterparties from the scope of these requirements may reduce direct and indirect compliance costs of U.S. SBS Dealers, potentially reducing transaction costs or improving liquidity; however, it may reduce potential information benefits of these final rules. Second, similar to the discussion above, excluding transactions between foreign SBS Dealers and their foreign counterparties may mitigate incentives for inefficient relocation by financial groups that use a non-U.S. dealer to carry out their dealing activity in the United States.

However, to the extent compliance with these business conduct requirements is costly and these costs are passed along to counterparties in, for instance, more adverse pricing and lower liquidity of available OTC security-based swaps, this alternative may give rise to competitive disparities between U.S. and non-U.S. counterparties of registered SBS Dealers. U.S. counterparties that are members of financial groups may respond by restructuring their security-based swap activity so that it is carried out by a non-U.S. person, in which case none of its transactions with SBS Dealers would be required to comply with transaction level business conduct requirements and incur related costs. To the extent that counterparties restructure their security-based swap activity in response to the incentives created by the competitive disparities and market fragmentation, a significant portion of that activity may occur outside the scope of these final business conduct requirements. U.S. persons that currently transact with SBS Dealers may have an incentive to migrate that business to affiliated non-U.S. persons to stay competitive with their non-U.S. competitors. The fraction of U.S. counterparties able to perform such restructuring and related costs are unclear. In contrast, the approach being adopted recognizes the importance of SBS Entity conduct for counterparty protections, may decrease incentives for such evasion, and enhance Commission oversight of registered SBS Entities.

b. Substituted Compliance

As discussed in Section III, the final rules contemplate a substituted compliance regime for substantive business conduct requirements. Substituted compliance may permit the counterparty protection, information and Commission oversight benefits of these final business conduct rules to be achieved while avoiding potential duplication of compliance costs that foreign SBS Entities may otherwise incur. As indicated in the Cross-Border release,[1760] to the extent that our business conduct rules conflict with regulations in foreign jurisdictions that also govern the activity of foreign SBS Entities that are subject to Title VII business conduct requirements, these final rules could act as a barrier to entry for foreign SBS Entities into the U.S. security-based swap market. Allowing market participants to comply with these final business conduct rules via substituted compliance could facilitate participation of non-resident SBS Entities in U.S. security-based swap markets. If foreign regulatory regimes are comparable to these final rules requirements,[1761] and to the extent that such foreign regimes have adequate compliance and enforcement capabilities, allowing substituted compliance for nonresident SBS Entities may help promote market efficiency and enhance competition in U.S. markets, potentially benefiting non-dealer counterparties.

At the same time, the process of making substituted compliance requests may cause nonresident SBS Entities to incur additional costs of applying for a substituted compliance determination. In Section V the Commission has estimated that three security-based swap dealers will submit substituted compliance applications, noting that the majority of substituted compliance requests may be made by foreign authorities. Based on our analysis of domiciles of likely SBS Entity registrants and our understanding of the market, we believe that there may be between four and nine substituted compliance applications with respect to these final rules. The total cost associated with SBS Entities preparing and submitting requests for substituted compliance determinations in connection with the business conduct requirements are estimated at, approximately, $406,770[1762] for up to

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[1760] *See* Cross-Border Adopting Release, 79 FR at 47359, *supra note 684.*

[1761] *See* ISDA (August 2013), *supra* note 7.

[1762] Initial internal cost of substituted compliance applications for SBS Entity applicants: (In-house attorney at $380 per hour) × (80 hours) × 3 = $91,200. External: (External counsel at 400$ per hour) × 200 × 3 = $240,000.

Consistent with the Registration Adopting release, certification and opinion of counsel is estimated at: (a) (In-house attorney at $380 per hour) × 0.5 hours × 3 = $570. (b) External: (External counsel at 400$ per hour) × 62.5 × 3 = $75,000. *See* Registration Adopting Release, 80 FR at 48994

Total cost for SBS Entities: $240,000 + $75,000 + $91,200 + $570 = $406,770

As noted in Section V, those amounts may overestimate the costs of requests pursuant to Rule 3a71–6 as adopted, as such requests would solely address business conduct requirements, rather than the broader proposed scope of substituted compliance set forth in that proposal. In addition, some SBS Entities may receive a positive substituted compliance determination and use the same certification and opinion of counsel when

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three requests. We also estimate that up to six foreign jurisdictions may make substituted compliance requests in connection with these final business conduct standards at an estimated cost of up to $524,790.[1763]

We note that substituted compliance requests will be made on a voluntary basis, and nonresident SBS Entities would only make such requests when the anticipated costs of relying on substituted compliance are lower than the costs of complying directly with these final rules. Further, after a substituted compliance determination is made, SBS Entities would choose substituted compliance only if their expected private benefits from participating in U.S. security-based swap markets exceed expected private costs, including any conditions the Commission may attach to the substituted compliance determination.

We also recognize that these costs and the overall economic effects of allowing substituted compliance for these final business conduct rules will depend on, among others, whether (and to what extent) substituted compliance requests will be granted for jurisdictions in which some of the most active nonresident SBS Entities are currently residing; the costs of potential relocation, business restructuring, or direct compliance by nonresident SBS Entities in jurisdictions for which substituted compliance is not granted; the relevant information required to demonstrate consistency between the foreign regulatory requirements and the Commission's business conduct rules; the relevant information required to demonstrate the adequacy of the foreign regime's compliance and enforcement mechanisms; and the fraction of SBS Entities in a given jurisdiction that may rely on substituted compliance if available.

We note that substituted compliance determinations will be made on a jurisdiction-wide basis. As a result, after the first applicant from a given jurisdiction receives an affirmative substituted compliance determination, all SBS Entities from the same jurisdiction will be able to comply with these final rules by complying with requirements of that foreign jurisdiction without bearing the related substituted compliance application costs. Such an approach eliminates duplication in application costs for SBS Entities from the same jurisdictions. However, foreign SBS Entities that are the first to make a substituted compliance application from a given jurisdiction will also bear greater costs, which disadvantages first movers. SBS Entities that intermediate greater volume or hold larger positions of security-based swaps in the United States, and SBS Entities that face greater costs of direct compliance with these final rules compared to costs of compliance with rules of a foreign jurisdiction may be the first SBS Entities to make substituted compliance applications and bear application costs.

SBS Entities in foreign jurisdictions with blocking laws, privacy laws, secrecy laws and other legal barriers inconsistent with the Commission's authority over registered entities will be unable to take advantage of substituted compliance. As part of these final rules, the Commission is adopting a requirement that, in order to make a request for substituted compliance, each party must provide the certification and opinion of counsel that the entity can as a matter of law, and will, provide the Commission with prompt access to the entity's books and records and submit to onsite inspection and examination by the Commission. Similarly, foreign financial regulatory authorities may make substituted compliance requests only if they can provide adequate assurances that no law or policy of any relevant foreign jurisdiction would impede the ability of any entity that is directly supervised by the authority and that may register as an SBS Entity to provide prompt access to the Commission to books and records or to submit to onsite inspection or examination. As a result of these requirements, the scope of SBS Entities and jurisdictions able to take advantage of substituted compliance may be reduced. However, as we have stated elsewhere,[1764] the Commission believes that significant elements of an effective regulatory regime are the Commission's abilities to access registered SBS Entities' books and records and to inspect and examine the operations of registered SBS Entities.

We note that U.S. SBS Entities will not be able to rely on substituted compliance with respect to any transactions, including transactions with foreign counterparties. Alternatively, the Commission could allow substituted compliance for U.S. SBS Entities. Under the alternative, U.S. SBS Entities would be able to comply with these substantive transaction-level requirements by complying with business conduct requirements of a comparable regulatory regime when dealing with counterparties domiciled in foreign countries. We recognize that U.S. SBS Entities may be competing for foreign counterparty business with foreign SBS Entities, and substituted compliance may reduce costs of complying with these final business conduct requirements. Under the alternative, the ability of U.S. SBS Entities to rely on substituted compliance may increase the profitability of U.S. SBS Entities transactions with foreign counterparties or may increase business for U.S. SBS Entities seeking to intermediate security-based swaps with foreign market participants. However, such an approach may adversely impact counterparty protection, informational asymmetry and Commission oversight benefits of these substantive requirements enjoyed by all counterparties of U.S. SBS Entities as a result of potential differences among global regulatory regimes. Since any potential costs of compliance with these substantive requirements may be passed on to counterparties, such an alternative may result in differential access and security-based swap terms of U.S. and foreign counterparties of U.S. SBS Entities.

Under the approach being adopted, foreign SBS Entities will be able to comply with these final business conduct requirements by complying with comparable foreign requirements. We have considered an alternative approach, under which the availability of substituted compliance is predicated on a finding of a direct conflict between Title VII and foreign regulatory requirements. Under this alternative, foreign SBS Entities that are currently complying with comparable (though not identical) requirements, would be required to bring their activities into compliance with these final rules, absent a direct conflict between Title VII requirements and their foreign regulatory regime. If the scope of comparable regulatory regimes is broader than the scope of regimes that are in direct conflict with the

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filing for registration, the costs of which were assessed in the Registration Adopting Release.

[1763] We believe that foreign jurisdictions are less likely to rely on outside counsel in preparing substituted compliance determinations and adequate assurances concerning Rule 15Fb2–4(c). In lieu of outside counsel we believe they will rely on internal government attorneys, estimated using SEC hourly cost for management and professional staff of $255.

Initial cost of substituted compliance applications for up to 6 foreign jurisdiction: (Government management and professional staff at $255) × (80 + 200) × 6 = $428,400.

Initial cost of certifications and assurances concerning Rule 15Fb2–4(c): (Government management and professional staff at $255) × (0.5 + 62.5) × 6 = $96,390.

Total cost for foreign jurisdictions: $428,400 + $96,390 = $524,790.

[1764] *See* Registration Adopting Release, 80 FR at 48981.

requirements of Title VII, this alternative may enable SBS Entities from fewer jurisdictions to take advantage of substituted compliance. As a result, the economic benefits of substituted compliance discussed above may be reduced.

Fewer foreign SBS Entities being eligible for substituted compliance may also reduce direct application costs to the industry. However, the burden of establishing a direct conflict may be greater than the burden related to establishing comparability, which may increase direct substituted compliance costs per application.

Crucially, if fewer SBS Entities are able to take advantage of substituted compliance under this alternative, a greater number of foreign SBS Entities would be required to incur costs of restructuring their systems and processes to comply with these final rules. Alternatively, foreign SBS Entities may choose relocate to another jurisdiction, or decrease their participation in U.S. security-based swap markets below thresholds triggering SBS Entity registration requirements and compliance with these final rules. To the extent that these costs may be passed on to counterparties of foreign SBS Entities or affect liquidity provision by foreign SBS Entities, transaction costs may increase and liquidity may be reduced. Further these costs may create a barrier to entry for foreign SBS Entities into U.S. security-based swap markets, and facilitate market segmentation.

Under this alternative, counterparties of foreign SBS Entities unable to rely on substituted compliance may benefit to a greater extent from the transparency and counterparty protections of these final rules. Further, U.S. SBS Entities and foreign SBS Entities from jurisdictions that are able to rely on substituted compliance may step in to intermediate trades with counterparties impacted by foreign SBS Entities unable to rely on substituted compliance. The Commission's future substituted compliance determinations with respect to individual foreign regimes will affect the scope of affected foreign SBS Entities. Therefore, we are unable to estimate and compare the number, market share and scope of counterparties of foreign SBS Entities that may be able to rely on substituted compliance under the approach being adopted, and under the alternative. However, we note that, using DTCC–TIW data as of year-end 2014, all foreign SBS Dealers likely to trigger registration requirements were responsible for 35% of the notional volume of all likely SBS Entities. In addition, as we have noted earlier in the economic analysis, in 2014 non-dealer counterparties transacted with a median of three and an average of four SBS Dealers.

We have also considered an alternative approach under which foreign SBS Entities would be able to rely on substituted compliance only in their transactions with non-U.S. counterparties. This alternative would effectively limit the scope of substituted compliance to non-U.S. SBS Entities that are transacting with non-U.S. counterparties, but are subject to these final rules as a result of their reliance on U.S. personnel discussed above. Such an approach could ensure that U.S. counterparties of all SBS Entities benefit from the same transparency and counterparty protection benefits of these final rules, regardless of the degree of comparability of foreign regimes. However, some foreign SBS Entities already complying with comparable regimes would incur additional costs of restructuring to comply with these final rules without being able to rely on substituted compliance in their transactions with U.S. counterparties. If such costs are significant, non-U.S. SBS Entities may become less willing to intermediate transactions with U.S. counterparties and transaction costs borne by U.S. counterparties may increase. While other U.S. SBS Entities are likely to step in and provide the necessary liquidity, this approach may adversely impact competition and facilitate market segmentation.

D. Effects on Efficiency, Competition and Capital Formation

In adopting these final rules, we are required to consider their effects on efficiency, competition and capital formation. As we discuss below, these final rules may enhance transparency, and improve informational and allocative efficiency in security-based swap markets. Greater transparency and allocative efficiency may incentivize quality based competition among market participants in general, and SBS Dealers in particular. In the discussion below, we address the potential effects of final disclosure, suitability and special entity rules on informational and allocative efficiency, and their effects on capital formation in security-based swap and reference security markets. We also consider how harmonization with the CFTC external business conduct rules facilitates ongoing market integration between swap and security-based swap markets, and lowers informational inefficiencies. Finally, we discuss the competitive burdens of compliance costs, their effects on the willingness of SBS Dealers to intermediate transactions with certain groups of counterparties, as well as competitive effects of the cross-border approach being adopted.

The business conduct standards for SBS Entities, including requirements to disclose material risks, characteristics, incentives and conflicts of interest related to security-based swaps, as well as the fair and balanced communications rule, may reduce information asymmetries between SBS Entities and their less sophisticated counterparties. To the extent that adverse selection costs described in Section VI.C.2 are present in security-based swap markets, market participants may become more informed and may increase their activity in security-based swaps, which may improve market quality. To the extent that security-based swap market participants consider disclosures under these final rules informative in selecting security-based swaps and SBS Entity counterparties, these final rules may help market participants make more informed counterparty choices. The increased disclosure of information regarding material risks and characteristics, incentives and conflicts of interest may lead to improved informational efficiency and quality-based competition among SBS Entities to the extent that market participants rely on this information in selecting security-based swaps and counterparties.

However, as more informed counterparties, SBS Entities are able to extract information rents from non-dealer counterparties. To the extent that the business conduct rules help inform counterparties, these rules may reduce the informational advantage of SBS Entities, and may decrease profitability of their transactions with non-dealer counterparties. As a result of disclosures of material risks, daily mark, conflicts of interest and other information regarding security-based swaps, some private information of SBS Dealers about the quality of security-based swaps and underlying reference securities may become public. As a result, security-based swap prices and dealer profit margins may decrease. These rules may reduce the incentives of SBS Dealers to gather private information that is impounded into prices, and SBS Dealer willingness to intermediate security-based swap transactions with non-dealer counterparties.

Enhanced disclosures and counterparty protections of these Business Conduct Standards may improve access to information, and may attract non-dealer market participants into security-based swap markets. These rules may, therefore, protect end users and other non-dealers that are effecting security-based swaps to manage risk or trade on negative information, which may improve their ability to make appropriate and informed portfolio decisions. However, if these rules result in less informed market participants playing an increasingly larger role in security-based swap markets, informational efficiency in security-based swap markets may decrease. This consideration is attenuated by the fact that uninformed participants bring valuable liquidity enabling informed traders, such as SBS Dealers, to execute informed trades with less price impact. The overall effects of these final rules on price discovery and informational efficiency in security-based swap markets are, therefore, difficult to assess.

The final suitability and special entity rules would require SBS Dealers to evaluate the suitability of trades for non-dealer counterparties and special entities when making recommendations to such counterparties, unless the SBS Dealer can rely on the institutional suitability alternative to fulfill its customer-specific suitability obligations. SBS Dealers may have superior information about security-based swaps, but may face an informational asymmetry when analyzing the hedging needs, risk tolerance and horizons of their counterparties. This requirement may preclude SBS Dealers from recommending some security-based swaps that may be truly suitable for a given counterparty, while recommending other security-based swaps that may be less suitable. The presence and magnitude of this economic effect depends on the tradeoff between the severity of information asymmetry concerning the nature of the swap and asymmetry concerning the counterparty, and potential losses and risks of investing in unsuitable security-based swaps relative to foregone profits from not investing in suitable security-based swaps.

Suitability requirements and resulting costs could further increase the costs to SBS Dealers of recommending security-based swaps to non-dealer counterparties, particularly counterparties with which the SBS Dealer has had no prior transactions, and counterparties that do not meet institutional suitability requirements. We also recognize that these rules may limit the ability of SBS Dealers to recommend some security-based swaps to certain counterparties, which may decrease the potential range of counterparties and products that some SBS Dealers may intermediate. If these effects result in SBS Dealers refraining from advising or transacting with some counterparties, and these counterparties are otherwise unable to receive advice or enter into security-based swaps, the suitability requirement may come at a net cost to these counterparties and would place them at a disadvantage relative to larger, more sophisticated competitors. To the extent that these counterparties do not participate in the security-based swap market as a result of these costs, adverse effects on market participation and liquidity may follow. However, as we noted previously, market data available to us reveal that relatively few counterparties enter into security-based swap agreements with an SBS Dealer without third-party representation, particularly among special entities. As a result of this third-party representation and the SBS Dealer's ability to fulfill its customer-specific suitability obligations by, among other things, making the determination that a counterparty's agent is capable of independently evaluating investment risk, as well as the exception of anonymous SEF executed security-based swaps, we do not believe that market access is likely to be restricted.

The final pay to play rules may reduce pay to play practices among SBS Dealers. To the extent that political contributions may currently be influencing counterparty and security-based swap selection, these rules may mitigate these influences and enhance allocative efficiency of municipal entities and facilitate greater quality-based competition of SBS Dealers. However, if some SBS Dealers become subject to a two-year time out due to inadvertent violations of the *de minimis* thresholds by themselves or their covered associates, and are unable to secure exemptive relief, fewer SBS Dealers may be able to transact with municipal entities in security-based swaps, which may increase the pricing power and decrease quality of execution of swaps offered to municipal entities by the remaining SBS Dealers. We note that SBS Dealers will have to keep updated records of political contributions of their covered associates, ensure their accuracy, promptly discover triggering contributions and seek their return. The costs of implementing such policies and procedures related to political contributions of covered associates will be greater for larger SBS Dealers with multiple layers of supervision and a higher number of covered associates with shorter tenures. While other business conduct rules tend to impose fixed burdens, which represent a higher fraction of net income for smaller SBS Dealers, this particular requirement may be significantly more costly for larger SBS Dealers.

Further, under these final rules, representatives of special entities transacting with SBS Entities are likely to be employees or independent representatives subject to Commission, CFTC or SRO pay to play rules. To the extent that some special entity representatives currently intermediating transactions with SBS Entities are not registered investment advisers, municipal advisors, other fiduciaries or employees, they may be unable to represent special entities in security-based swap transactions with SBS Entities unless they register as such. This may decrease competition among qualified investment representatives of special entities, or incentivize unregistered representatives to register, for instance, as investment advisers with the Commission or as municipal advisors with the MSRB.

The direct and indirect costs of compliance with these final business conduct rules may be recovered by SBS Entities in the form of higher transaction costs or more adverse non-price terms of security-based swaps offered to counterparties. To the extent that these costs cannot be recovered, incentives for some entities to operate as registered U.S. SBS Entities may be reduced,[1765] which may adversely affect competition in security-based swap markets. In addition, some counterparties may lose access to the market for OTC swaps. However, we note that, as discussed above, anonymous SEF transactions are exempt from some of the substantive requirements of these final rules, which may allow such counterparties to retain access to security-based swaps. Further, to the extent that these rules impose costs and restrictions on non-SEF trades that are not born by SBS Entities related to SEF trades, the volume of transactions executed on SEFs may increase. We recognize that, as a result, these final rules may increase the programmatic costs and benefits of pending SEF and clearing rules, with their follow on effects on efficiency, competition and capital formation, which will be evaluated in pending SEF and clearing rules. We recognize similarities between CFTC external business conduct standards for Swap Entities, FINRA rules for broker dealers and the rules being adopted. Due to extensive cross-market participation, many of the entities expected to register as SBS Entities will have already registered with the CFTC as Swap Entities or with the Commission as broker dealers, yet others may already be subject to similar MSRB rules. To the extent that these final rules involve initial compliance costs, dually registered SBS entities may experience significantly lower initial compliance costs. At the same time, new entrants and SBS Entities that are not dually registered may face higher costs. Competitive effects of these final business conduct rules primarily stem from differences in burdens incurred by dual registrants on the one hand, and non-dually registered SBS Entities and new entrants on the other.

[1765] *See* U.S. Activity Adopting Release, 81 FR at 8629.

In addition to the competitive effects of compliance burdens above, the cross-border approach adopted in these final rules may impact competition between U.S. and non-U.S. SBS Entities and their U.S. and non-U.S. personnel. A substituted compliance regime for business conduct requirements and their application to non-U.S. persons' dealing transactions that are arranged, negotiated, or executed using personnel located in the United States may mitigate competitive frictions between U.S. and non-U.S. SBS Dealers that transact with foreign counterparties, and may promote market efficiency. The final cross-border approach to business conduct requirements will result in a uniform application of these requirements to U.S. and non-U.S. SBS Dealers and their agents. If only U.S. SBS Dealers and their agents were subject to disclosure, suitability and other requirements in these final rules when transacting with foreign counterparties, the costs of such disclosures would primarily be incurred by U.S. SBS Dealers, their agents, and their counterparties. In contrast, non-U.S. SBS Dealers and their agents, including personnel located in the United States, would potentially have a competitive advantage over U.S. SBS Dealers in serving non-U.S. person counterparties using personnel located in a U.S. branch or office, were their activities not subject to the same requirements.[1766] Therefore, the cross-border application of these final business conduct rules may enhance competition among these SBS Dealers.

Access to SEC-regulated security-based swap markets increases hedging opportunities for financial market intermediaries; such hedging opportunities reduce risks and allow intermediaries to facilitate a greater volume of financing activities, including issuance of equity and debt securities, and therefore contribute to capital formation. As we have stated in other releases,[1767] this may be particularly true in underlying securities markets, where potential pricing and liquidity effects in security-based swap markets may feedback and impact the market for reference entity securities. Security-based swap markets may enable better risk mitigation by investors in underlying reference securities, such as CDS hedging of the credit risk of corporate bond investments. The possible contraction in security-based swap market participation by SBS Entities due to costs of compliance with these final rules may adversely impact underlying reference security markets, including pricing and liquidity in corporate bond and equity markets. This may have a negative effect on the ability of firms to raise debt and equity capital to finance real investment. However, the spillover from potential deterioration in security-based swap markets into underlying reference security markets may also be positive. Sophisticated institutional investors transact across CDS and bond markets to trade on information pertaining to the credit risk of underlying reference debt. A potential negative shock to security-based swap market liquidity and dealing by SBS Entities with non-SBS Entity counterparties as a result of required compliance with these final rules may, in fact, drive sophisticated institutions to search for liquidity pools and lower price impact of informed trades to reference security markets. If institutions begin to trade more actively in underlying reference security markets, such as corporate bond markets as a result, there may be positive effects on liquidity and informational efficiency of corporate bond and equity markets.[1768] This may enable firms to raise more debt and equity at potentially lower costs to finance real investment.

VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[1769] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the Proposing Release, pursuant to Section 605(b) of the RFA,[1770] that proposed Rules 15Fh–1 through 15Fh–6 and Rule 15Fk–1 would not, if adopted, have a significant economic impact on a substantial number of "small entities."[1771] The Commission received no comments on this certification.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (i) When used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[1772] or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1773] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1774] With respect to investment companies in connection with the RFA, the term "small business" or "small organization" means an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities in credit intermediation and related activities,[1775] entities with $550 million or less in assets or, (ii) for non-depository credit intermediation and certain other activities,[1776] $38.5

[1766] *See, e.g.,* Arnoud W.A. Boot, Silva Dezelan, and Todd T. Milbourn, "Regulatory Distortions in a Competitive Financial Services Industry," Journal of Financial Services Research, Vol. 17, No. 1 (2000).

[1767] *See* Registration Adopting Release, 80 FR 49008, *supra* note 989.

[1768] *See* Section VI.B.5.

[1769] 5 U.S.C. 601 *et seq.*

[1770] 5 U.S.C. 605(b).

[1771] Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See Statement of Management on Internal Control,* Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

[1772] *See* 17 CFR 240.0–10(a).

[1773] *See* 17 CFR 240.17a–5(d).

[1774] *See* 17 CFR 240.0–10(c).

[1775] Including commercial banks, savings institutions, credit unions, firms involved in other depository credit intermediation, credit card issuing, sales financing, consumer lending, real estate credit, and international trade financing. 13 CFR 121.201 at Subsector 522.

[1776] Including firms involved in secondary market financing, all other non-depository credit intermediation, mortgage and nonmortgage loan brokers, financial transactions processing, reserve,

Continued

million or less in annual receipts; (iii) for entities in financial investments and related activities,[1777] entities with $38.5 million or less in annual receipts; (iv) for insurance carriers and entities in related activities,[1778] entities with $38.5 million or less in annual receipts, or 1,500 employees for direct property and casualty insurance carriers; and (v) for funds, trusts, and other financial vehicles,[1779] entities with $32.5 million or less in annual receipts.[1780]

With respect to SBS Entities, based on feedback from market participants and our information about the security-based swap markets, the Commission continues to believe that (1) the types of entities that would engage in more than a *de minimis* amount of dealing activity involving security-based swaps—which generally would be large financial institutions—would not be "small entities" for purposes of the RFA; and (2) the types of entities that may have security-based swap positions above the level required to be "major security-based swap participants" would not be "small entities" for purposes of the RFA.[1781]

For the foregoing reasons, the Commission certifies that the SBS Entity registration rules and forms, as adopted would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Statutory Basis and Text of Final Rules

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 3C, 9, 10, 11A, 15, 15F, 17(a) and (b), 23(a) and 30(c) thereof (15 U.S.C. 78b, 78c(b), 78i(i), 78i(j), 78j, 78k–1, 78o, 78o–10, 78q(a) and (b), 78w(a) and 78dd(c)), the Commission is adopting Rule 3a71–6, Rules 15Fh–1 through 15Fh–6, and Rule 15Fk–1, and is amending Rules 3a67–10 and 3a71–3, to address the business conduct obligations of security-based swap dealers and major security-based swap participants, including the cross-border application of those obligations and the availability of substituted compliance in connection with those obligations.

List of Subjects in 17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Final Rules

For the reasons set forth in the preamble, the Securities and Exchange Commission is amending Title 17, Chapter II of the Code of Federal Regulations, as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, and sectional authorities for sections 240.3a71–6, 240.15Fh–1 through 240.15Fh–6, and 240.15Fk–1 are added in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376, (2010), unless otherwise noted.

* * * * *

Section 240.3a67–10, 240.3a71–3, 240.3a71–4, 240.3a71–5, and 240.3a71–6 are also issued under Pub. L. 111–203, secs. 712, 761(b), 124 Stat. 1754 (2010), and 15 U.S.C. 78dd(c).

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Sections 240.15Fh–1 through 240.15Fh–6 and 240.15Fk–1 are also issued under sec. 943, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

■ 2. § 240.3a67–10 is amended by:
■ a. Adding paragraphs (a)(5) and (6); and
■ b. Adding paragraph (d).

The additions read as follows:

§ 240.3a67–10 Foreign major security-based swap participants.

(a) * * *

(5) *U.S. major security-based swap participant* means a major security-based swap participant, as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, that is a U.S. person.

(6) *Foreign major security-based swap participant* means a major security-based swap participant, as defined in section 3(a)(67) of the Act (15 U.S.C. 78c(a)(67)), and the rules and regulations thereunder, that is not a U.S. person.

* * * * *

(d) *Application of customer protection requirements.* (1) A registered foreign major security-based swap participant shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o–10(h)(1)(B)), with respect to a security-based swap transaction with a counterparty that is not a U.S. person or with a counterparty that is a U.S. person in a transaction conducted through a foreign branch of the U.S. person.

(2) A registered U.S. major security-based swap participant shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o–10(h)(1)(B)), with respect to a security-based swap transaction that constitutes a transaction conducted through a foreign branch of the registered U.S. major security-based swap participant with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of that U.S.-person counterparty.

■ 3. § 240.3a71–3 is amended by:
■ a. Adding paragraphs (a)(6) through (9); and
■ b. Adding paragraph (c).

The additions read as follows:

§ 240.3a71–3 Cross-border security-based swap dealing activity.

(a) * * *

(6) *U.S. security-based swap dealer* means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is a U.S. person.

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and clearing house activities, and other activities related to credit intermediation. 13 CFR 121.201 at Subsector 522.

[1777] Including firms involved in investment banking and securities dealing, securities brokerage, commodity contracts dealing, commodity contracts brokerage, securities and commodity exchanges, miscellaneous intermediation, portfolio management, providing investment advice, trust, fiduciary and custody activities, and miscellaneous financial investment activities. 13 CFR 121.201 at Subsector 523.

[1778] Including direct life insurance carriers, direct health and medical insurance carriers, direct property and casualty insurance carriers, direct title insurance carriers, other direct insurance (except life, health and medical) carriers, reinsurance carriers, insurance agencies and brokerages, claims adjusting, third party administration of insurance and pension funds, and all other insurance related activities. 13 CFR 121.201 at Subsector 524.

[1779] Including pension funds, health and welfare funds, other insurance funds, open-end investment funds, trusts, estates, and agency accounts, real estate investment trusts and other financial vehicles. 13 CFR 121.201 at Subsector 525.

[1780] *See* 13 CFR 121.201.

[1781] *See* Recordkeeping Release, 79 FR 25194, 25296–97 & n.1441, *supra* note 242; Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596, 30743 (May 23, 2012) (joint Commission/CFTC final rules); Registration Adopting Release, 80 FR 48964, 49012–49013, supra note 989.

(7) *Foreign security-based swap dealer* means a security-based swap dealer, as defined in section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)), and the rules and regulations thereunder, that is not a U.S. person.

(8) *U.S. business* means:

(i) With respect to a foreign security-based swap dealer:

(A) Any security-based swap transaction entered into, or offered to be entered into, by or on behalf of such foreign security-based swap dealer, with a U.S. person (other than a transaction conducted through a foreign branch of that person); or

(B) Any security-based swap transaction arranged, negotiated, or executed by personnel of the foreign security-based swap dealer located in a U.S. branch or office, or by personnel of an agent of the foreign security-based swap dealer located in a U.S. branch or office; and

(ii) With respect to a U.S. security-based swap dealer, any transaction entered into or offered to be entered into by or on behalf of such U.S. security-based swap dealer, other than a transaction conducted through a foreign branch with a non-U.S. person or with a U.S.-person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty.

(9) *Foreign business* means security-based swap transactions entered into, or offered to be entered into, by or on behalf of a security-based swap dealer, other than the U.S. business of such person.

* * * * *

(c) *Application of customer protection requirements.* A registered security-based swap dealer, with respect to its foreign business, shall not be subject to the requirements relating to business conduct standards described in section 15F(h) of the Act (15 U.S.C. 78o–10(h)), and the rules and regulations thereunder, other than the rules and regulations prescribed by the Commission pursuant to section 15F(h)(1)(B) of the Act (15 U.S.C. 78o–10(h)(1)(B)).

■ 4. Add § 240.3a71–6 to read as follows:

§ 240.3a71–6 Substituted compliance for security-based swap dealers and major security-based swap participants.

(a) *Determinations*—(1) *In general.* Subject to paragraph (a)(2) of this section, the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under such foreign financial regulatory system by a registered security-based swap dealer and/or by a registered major security-based swap participant (each a "security-based swap entity"), or class thereof, may satisfy the corresponding requirements identified in paragraph (d) of this section that would otherwise apply to such security-based swap entity (or class thereof).

(2) *Standard.* The Commission shall not make a substituted compliance determination under paragraph (a)(1) of this section unless the Commission:

(i) Determines that the requirements of such foreign financial regulatory system applicable to such security-based swap entity (or class thereof) or to the activities of such security-based swap entity (or class thereof) are comparable to otherwise applicable requirements, after taking into account such factors as the Commission determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements (taking into account the applicable criteria set forth in paragraph (d) of this section), as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such security-based swap entity (or class thereof) or of the activities of such security-based swap entity (or class thereof); and

(ii) Has entered into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority or authorities under such foreign financial regulatory system addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.

(3) *Withdrawal or modification.* The Commission may, on its own initiative, by order, modify or withdraw a substituted compliance determination under paragraph (a)(1) of this section, after appropriate notice and opportunity for comment.

(b) *Reliance by security-based swap entities.* A registered security-based swap entity may satisfy the requirements described in paragraph (d) of this section by complying with corresponding law, rules and regulations under a foreign financial regulatory system, provided:

(1) The Commission has made a substituted compliance determination pursuant to paragraph (a)(1) of this section regarding such foreign financial regulatory system providing that compliance with specified requirements under such foreign financial regulatory system by such registered security-based swap entity (or class thereof) may satisfy the corresponding requirements described in paragraph (d) of this section; and

(2) Such registered security-based swap entity satisfies any conditions set forth in a substituted compliance determination made by the Commission pursuant to paragraph (a)(1) of this section.

(c) *Requests for determinations.* (1) A party or group of parties that potentially would comply with specified requirements pursuant to paragraph (a)(1), or any foreign financial regulatory authority or authorities supervising such a party or its security-based swap activities, may file an application, pursuant to the procedures set forth in § 240.0–13, requesting that the Commission make a substituted compliance determination pursuant to paragraph (a)(1) of this section, with respect to one or more requirements described in paragraph (d) of this section.

(2) Such a party or group of parties may make a request under paragraph (c)(1) of this section only if:

(i) Each such party, or the party's activities, is directly supervised by the foreign financial regulatory authority or authorities with respect to the foreign regulatory requirements relating to the applicable requirements described in paragraph (d) of this section; and

(ii) Each such party provides the certification and opinion of counsel as described in § 240.15Fb2–4(c), as if the party were subject to that requirement at the time of the request.

(3) Such foreign financial authority or authorities may make a request under paragraph (c)(1) of this section only if each such authority provides adequate assurances that no law or policy of any relevant foreign jurisdiction would impede the ability of any entity that is directly supervised by the foreign financial regulatory authority and that may register with the Commission as a security-based swap dealer or major security-based swap participant to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.

(d) *Eligible requirements.* The Commission may make a substituted compliance determination under paragraph (a)(1) of this section to permit security-based swap entities that are not U.S. persons (as defined in § 240.3a71–3(a)(4)), but not security-based swap entities that are U.S. persons, to satisfy the following requirements by complying with comparable foreign requirements:

(1) *Business conduct and supervision.* The business conduct and supervision requirements of sections 15F(h) and (j) of the Act (15 U.S.C. 78o–10(h) and (j)) and §§ 240.15Fh–3 through 15Fh–6, other than the antifraud provisions of section 15F(h)(4)(A) of the Act and § 240.15Fh–4(a), and other than the provisions of sections 15F(j)(3) and 15F(j)(4)(B) of the Act; provided, however, that prior to making such a substituted compliance determination the Commission intends to consider whether the information that is required to be provided to counterparties pursuant to the requirements of the foreign financial regulatory system, the counterparty protections under the requirements of the foreign financial regulatory system, the mandates for supervisory systems under the requirements of the foreign financial regulatory system, and the duties imposed by the foreign financial regulatory system, are comparable to those associated with the applicable provisions arising under the Act and its rules and regulations.

(2) *Chief compliance officer.* The chief compliance officer requirements of section 15F(k) of the Act (15 U.S.C. 78o–10(k)) and § 240.15Fk–1; provided, however, that prior to making such a substituted compliance determination the Commission intends to consider whether the requirements of the foreign financial regulatory system regarding chief compliance officer obligations are comparable to those required pursuant to the applicable provisions arising under the Act and its rules and regulations.

■ 5. Add §§ 240.15Fh–1 through 240.15Fh–6, and § 240.15Fk–1 to read as follows:

§ 240.15Fh–1 Scope and reliance on representations.

(a) *Scope.* Sections 240.15Fh–1 through 240.15Fh–6, and 240.15Fk–1 are not intended to limit, or restrict, the applicability of other provisions of the federal securities laws, including but not limited to section 17(a) of the Securities Act of 1933 and sections 9 and 10(b) of the Act, and rules and regulations thereunder, or other applicable laws and rules and regulations. Sections 240.15Fh–1 through 240.15Fh–6, and 240.15Fk–1 apply, as relevant, in connection with entering into security-based swaps and continue to apply, as appropriate, over the term of executed security-based swaps. Sections 240.15Fh–3(a) through 240.15Fh–3(f), 240.15Fh–4(b) and 240.15Fh–5 are not applicable to security-based swaps that security-based swap dealers or major security-based swap participants enter into with their majority-owned affiliates. For these purposes the counterparties to a security-based swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where "majority interest" is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

(b) *Reliance on representations.* A security-based swap dealer or major security-based swap participant may rely on written representations from the counterparty or its representative to satisfy its due diligence requirements under § 240.15Fh, unless it has information that would cause a reasonable person to question the accuracy of the representation.

§ 240.15Fh–2 Definitions.

As used in §§ 240.15Fh–1 through 240.15Fh–6:

(a) *Act as an advisor to a special entity.* A security-based swap dealer *acts as an advisor to a special entity* when it recommends a security-based swap or a trading strategy that involves the use of a security-based swap to the special entity, unless:

(1) With respect to a special entity as defined in § 240.15Fh–2(d)(3):

(i) The special entity represents in writing that it has a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the special entity in connection with the security-based swap;

(ii) The fiduciary represents in writing that it acknowledges that the security-based swap dealer is not acting as an advisor; and

(iii) The special entity represents in writing:

(A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the special entity receives from the security-based swap dealer involving a security-based swap transaction is evaluated by a fiduciary before the transaction is entered into; or

(B) That any recommendation the special entity receives from the security-based swap dealer involving a security-based swap transaction will be evaluated by a fiduciary before the transaction is entered into.

(2) With respect to any special entity:

(i) The special entity represents in writing that:

(A) It acknowledges that the security-based swap dealer is not acting as an advisor; and

(B) The special entity will rely on advice from a qualified independent representative as defined in § 240.15Fh–5(a); and

(ii) The security-based swap dealer discloses to the special entity that it is not undertaking to act in the best interest of the special entity, as otherwise required by section 15F(h)(4) of the Act.

(b) *Eligible contract participant* means any person as defined in section 3(a)(65) of the Act and the rules and regulations thereunder and in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) and the rules and regulations thereunder.

(c) *Security-based swap dealer or major security-based swap participant* includes, where relevant, an associated person of the security-based swap dealer or major security-based swap participant.

(d) *Special entity* means:

(1) A Federal agency;

(2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;

(3) Any employee benefit plan, subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any employee benefit plan defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) and not otherwise defined as a special entity, unless such employee benefit plan elects not to be a special entity by notifying a security-based swap dealer or major security-based swap participant of its election prior to entering into a security-based swap with the particular security-based swap dealer or major security-based swap participant;

(5) Any governmental plan, as defined in section 3(32) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(32)); or

(6) Any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986.

(e) A person is *subject to a statutory disqualification* for purposes of § 240.15Fh–5 if that person would be subject to a statutory disqualification, as described in section 3(a)(39)(A)–(F) of the Act.

§ 240.15Fh–3 Business conduct requirements.

(a) *Counterparty status*—(1) *Eligible contract participant.* A security-based swap dealer or a major security-based swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant before entering into a security-based swap with that counterparty, provided that the requirements of this paragraph (a)(1) shall not apply to a transaction executed on a registered national securities exchange.

(2) *Special entity.* A security-based swap dealer or a major security-based swap participant shall verify whether a counterparty is a special entity before entering into a security-based swap with that counterparty, unless the transaction is executed on a registered or exempt security-based swap execution facility or registered national securities exchange, and the security-based swap dealer or major security-based swap participant does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer or major security-based swap participant to comply with the obligations of paragraph (a) of this section.

(3) *Special entity election.* In verifying the special entity status of a counterparty pursuant to § 240.15Fh–3(a)(2), a security-based swap dealer or major security-based swap participant shall verify whether a counterparty is eligible to elect not to be a special entity under § 240.15Fh–2(d)(4) and, if so, notify such counterparty of its right to make such an election.

(b) *Disclosure.* At a reasonably sufficient time prior to entering into a security-based swap, a security-based swap dealer or major security-based swap participant shall disclose to a counterparty, other than a security-based swap dealer, major security-based swap participant, swap dealer or major swap participant, material information concerning the security-based swap in a manner reasonably designed to allow the counterparty to assess the material risks and characteristics and material incentives or conflicts of interest, as described below, so long as the identity of the counterparty is known to the security-based swap dealer or major security-based swap participant at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer or major security-based swap participant to comply with the obligations of paragraph (b) of this section.

(1) *Material risks and characteristics* means the material risks and characteristics of the particular security-based swap, which may include:

(i) Market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks; and

(ii) The material economic terms of the security-based swap, the terms relating to the operation of the security-based swap, and the rights and obligations of the parties during the term of the security-based swap.

(2) *Material incentives or conflicts of interest* means any material incentives or conflicts of interest that the security-based swap dealer or major security-based swap participant may have in connection with the security-based swap, including any compensation or other incentives from any source other than the counterparty in connection with the security-based swap to be entered into with the counterparty.

(3) *Record.* The security-based swap dealer or major security-based swap participant shall make a written record of the non-written disclosures made pursuant to this paragraph (b), and provide a written version of these disclosures to its counterparties in a timely manner, but in any case no later than the delivery of the trade acknowledgement of the particular transaction pursuant to § 240.15Fi–1.

(c) *Daily mark.* A security-based swap dealer or major security-based swap participant shall disclose the daily mark to the counterparty, other than a security-based swap dealer, major security-based swap participant, swap dealer or major swap participant, which shall be:

(1) For a cleared security-based swap, upon request of the counterparty, the daily mark that the security-based swap dealer or major security-based swap participant receives from the appropriate clearing agency;

(2) For an uncleared security-based swap, the midpoint between the bid and offer, or the calculated equivalent thereof, as of the close of business, unless the parties agree in writing otherwise to a different time, on each business day during the term of the security-based swap. The daily mark may be based on market quotations for comparable security-based swaps, mathematical models or a combination thereof. The security-based swap dealer or major security-based swap participant shall also disclose its data sources and a description of the methodology and assumptions used to prepare the daily mark, and promptly disclose any material changes to such data sources, methodology and assumptions during the term of the security-based swap; and

(3) The security-based swap dealer or major security-based swap participant shall provide the daily mark without charge to the counterparty and without restrictions on the internal use of the daily mark by the counterparty.

(d) *Disclosure regarding clearing rights.* A security-based swap dealer or major security-based swap participant shall disclose the following information to a counterparty, other than a security-based swap dealer, major security-based swap participant, swap dealer or major swap participant, so long as the identity of the counterparty is known to the security-based swap dealer or major security-based swap participant at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer or major security-based swap participant to comply with the obligations of paragraph (d) of this section:

(1) *For security-based swaps subject to clearing requirement.* Before entering into a security-based swap subject to the clearing requirement under section 3C(a) of the Act, a security-based swap dealer or major security-based swap participant shall:

(i) Disclose to the counterparty the names of the clearing agencies that accept the security-based swap for clearing, and through which of those clearing agencies the security-based swap dealer or major security-based swap participant is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap; and

(ii) Notify the counterparty that it shall have the sole right to select which of the clearing agencies described in paragraph (d)(1)(i) of this section shall be used to clear the security-based swap subject to section 3C(g)(5) of the Act.

(2) *For security-based swaps not subject to clearing requirement.* Before entering into a security-based swap not subject to the clearing requirement under section 3C(a) of the Act, a security-based swap dealer or major security-based swap participant shall:

(i) Determine whether the security-based swap is accepted for clearing by one or more clearing agencies;

(ii) Disclose to the counterparty the names of the clearing agencies that accept the security-based swap for clearing, and whether the security-based swap dealer or major security-based swap participant is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap through such clearing agencies; and

(iii) Notify the counterparty that it may elect to require clearing of the security-based swap and shall have the sole right to select the clearing agency at which the security-based swap will be cleared, provided it is a clearing agency at which the security-based swap dealer or major security-based swap participant is authorized or permitted, directly or through a designated clearing member, to clear the security-based swap.

(3) *Record.* The security-based swap dealer or major security-based swap participant shall make a written record of the non-written disclosures made pursuant to this paragraph (d), and provide a written version of these disclosures to its counterparties in a timely manner, but in any case no later than the delivery of the trade acknowledgement of the particular transaction pursuant to § 240.15Fi–1.

(e) *Know your counterparty.* Each security-based swap dealer shall establish, maintain and enforce written policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the security-based swap dealer that are necessary for conducting business with such counterparty. For purposes of paragraph (e) of this section, the *essential facts concerning a counterparty* are:

(1) Facts required to comply with applicable laws, regulations and rules;

(2) Facts required to implement the security-based swap dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(f) *Recommendations of security-based swaps or trading strategies.* (1) A security-based swap dealer that recommends a security-based swap or trading strategy involving a security-based swap to a counterparty, other than a security-based swap dealer, major security-based swap participant, swap dealer, or major swap participant, must:

(i) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended security-based swap or trading strategy involving a security-based swap; and

(ii) Have a reasonable basis to believe that a recommended security-based swap or trading strategy involving a security-based swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a security-based swap dealer must have or obtain relevant information regarding the counterparty, including the counterparty's investment profile, trading objectives, and its ability to absorb potential losses associated with the recommended security-based swap or trading strategy involving a security-based swap.

(2) A security-based swap dealer may also fulfill its obligations under paragraph (f)(1)(ii) of this section with respect to an institutional counterparty, if:

(i) The security-based swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant security-based swap or trading strategy involving a security-based swap;

(ii) The counterparty or its agent affirmatively represents in writing that it is exercising independent judgment in evaluating the recommendations of the security-based swap dealer with regard to the relevant security-based swap or trading strategy involving a security-based swap; and

(iii) The security-based swap dealer discloses that it is acting in its capacity as a counterparty, and is not undertaking to assess the suitability of the security-based swap or trading strategy for the counterparty.

(3) A security-based swap dealer will be deemed to have satisfied its obligations under paragraph (f)(2)(i) of this section if it receives written representations, as provided in § 240.15Fh–1(b), that:

(i) In the case of a counterparty that is not a special entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or

(ii) In the case of a counterparty that is a special entity, satisfy the terms of the safe harbor in § 240.15Fh–5(b).

(4) For purposes of paragraph (f)(2) of this section, an institutional counterparty is a counterparty that is an eligible contract participant as defined in clauses (A)(i), (ii), (iii), (iv), (viii), (ix) or (x), or clause (B)(ii) (other than a person described in clause (A)(v)) of section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1(a)(18)) and the rules and regulations thereunder, or any person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

(g) *Fair and balanced communications.* A security-based swap dealer or major security-based swap participant shall communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith. In particular:

(1) Communications must provide a sound basis for evaluating the facts with regard to any particular security-based swap or trading strategy involving a security-based swap;

(2) Communications may not imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; and

(3) Any statement referring to the potential opportunities or advantages presented by a security-based swap shall be balanced by an equally detailed statement of the corresponding risks.

(h) *Supervision*—(1) *In general.* A security-based swap dealer or major security-based swap participant shall establish and maintain a system to supervise, and shall diligently supervise, its business and the activities of its associated persons. Such a system shall be reasonably designed to prevent violations of the provisions of applicable federal securities laws and the rules and regulations thereunder relating to its business as a security-based swap dealer or major security-based swap participant, respectively.

(2) *Minimum requirements.* The system required by paragraph (h)(1) of this section shall, at a minimum, provide for:

(i) The designation of at least one person with authority to carry out the supervisory responsibilities of the security-based swap dealer or major security-based swap participant for each type of business in which it engages for which registration as a security-based swap dealer or major security-based swap participant is required;

(ii) The use of reasonable efforts to determine that all supervisors are qualified, either by virtue of experience or training, to carry out their assigned responsibilities; and

(iii) Establishment, maintenance and enforcement of written policies and procedures addressing the supervision of the types of security-based swap business in which the security-based swap dealer or major security-based swap participant is engaged and the activities of its associated persons that are reasonably designed to prevent violations of applicable federal securities laws and the rules and regulations thereunder, and that include, at a minimum:

(A) Procedures for the review by a supervisor of transactions for which registration as a security-based swap dealer or major security-based swap participant is required;

(B) Procedures for the review by a supervisor of incoming and outgoing written (including electronic) correspondence with counterparties or potential counterparties and internal written communications relating to the security-based swap dealer's or major security-based swap participant's business involving security-based swaps;

(C) Procedures for a periodic review, at least annually, of the security-based swap business in which the security-based swap dealer or major security-based swap participant engages that is reasonably designed to assist in detecting and preventing violations of applicable federal securities laws and the rules and regulations thereunder;

(D) Procedures to conduct a reasonable investigation regarding the good character, business repute, qualifications, and experience of any person prior to that person's association with the security-based swap dealer or major security-based swap participant;

(E) Procedures to consider whether to permit an associated person to establish or maintain a securities or commodities account or a trading relationship in the name of, or for the benefit of such associated person, at another security-based swap dealer, broker, dealer, investment adviser, or other financial institution; and if permitted, procedures to supervise the trading at the other security-based swap dealer, broker, dealer, investment adviser, or financial institution;

(F) A description of the supervisory system, including the titles, qualifications and locations of supervisory persons and the responsibilities of each supervisory person with respect to the types of business in which the security-based swap dealer or major security-based swap participant is engaged;

(G) Procedures prohibiting an associated person who performs a supervisory function from supervising his or her own activities or reporting to, or having his or her compensation or continued employment determined by, a person or persons he or she is supervising; provided, however, that if the security-based swap dealer or major security-based swap participant determines, with respect to any of its supervisory personnel, that compliance with this requirement is not possible because of the firm's size or a supervisory person's position within the firm, the security-based swap dealer or major security-based swap participant must document the factors used to reach such determination and how the supervisory arrangement with respect to such supervisory personnel otherwise complies with paragraph (h)(1) of this section, and include a summary of such determination in the annual compliance report prepared by the security-based swap dealer's or major security-based swap participant's chief compliance officer pursuant to § 240.15Fk–1(c);

(H) Procedures reasonably designed to prevent the supervisory system required by paragraph (h)(1) of this section from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the security-based swap dealer or major security-based swap participant, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised; and

(I) Procedures reasonably designed, taking into consideration the nature of such security-based swap dealer's or major security-based swap participant's business, to comply with the duties set forth in section 15F(j) of the Act.

(3) *Failure to supervise.* A security-based swap dealer or major security-based swap participant or an associated person of a security-based swap dealer or major security-based swap participant shall not be deemed to have failed to diligently supervise any other person, if such other person is not subject to his or her supervision, or if:

(i) The security-based swap dealer or major security-based swap participant has established and maintained written policies and procedures as required in § 240.15Fh–3(h)(2)(iii), and a documented system for applying those policies and procedures, that would reasonably be expected to prevent and detect, insofar as practicable, any violation of the federal securities laws and the rules and regulations thereunder relating to security-based swaps; and

(ii) The security-based swap dealer or major security-based swap participant, or associated person of the security-based swap dealer or major security-based swap participant, has reasonably discharged the duties and obligations required by such written policies and procedures and documented system and did not have a reasonable basis to believe that such written policies and procedures and documented system were not being followed.

(4) *Maintenance of written supervisory procedures.* A security-based swap dealer or major security-based swap participant shall:

(i) Promptly amend its written supervisory procedures as appropriate when material changes occur in applicable securities laws or rules or regulations thereunder, and when material changes occur in its business or supervisory system; and

(ii) Promptly communicate any material amendments to its supervisory procedures to all associated persons to whom such amendments are relevant based on their activities and responsibilities.

§ 240.15Fh–4 Antifraud provisions for security-based swap dealers and major security-based swap participants; special requirements for security-based swap dealers acting as advisors to special entities.

(a) *Antifraud provisions.* It shall be unlawful for a security-based swap dealer or major security-based swap participant:

(1) To employ any device, scheme, or artifice to defraud any special entity or prospective customer who is a special entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any special entity or prospective customer who is a special entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Special requirements for security-based swap dealers acting as advisors to special entities.* A security-based swap dealer that acts as an advisor to a special entity regarding a security-based swap shall comply with the following requirements:

(1) *Duty.* The security-based swap dealer shall have a duty to make a reasonable determination that any security-based swap or trading strategy involving a security-based swap recommended by the security-based swap dealer is in the best interests of the special entity.

(2) *Reasonable efforts.* The security-based swap dealer shall make reasonable efforts to obtain such information that the security-based swap dealer considers necessary to make a reasonable determination that a security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity. This information shall include, but not be limited to:

(i) The authority of the special entity to enter into a security-based swap;

(ii) The financial status of the special entity, as well as future funding needs;

(iii) The tax status of the special entity;

(iv) The hedging, investment, financing or other objectives of the special entity;

(v) The experience of the special entity with respect to entering into security-based swaps, generally, and security-based swaps of the type and complexity being recommended;

(vi) Whether the special entity has the financial capability to withstand changes in market conditions during the term of the security-based swap; and

(vii) Such other information as is relevant to the particular facts and circumstances of the special entity, market conditions and the type of security-based swap or trading strategy involving a security-based swap being recommended.

(3) *Exception.* The requirements of this paragraph (b) shall not apply with respect to a security-based swap if:

(i) The transaction is executed on a registered or exempt security-based swap execution facility or registered national securities exchange; and

(ii) The security-based swap dealer does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer to comply with the obligations of paragraph (b) of this section.

§ 240.15Fh–5 Special requirements for security-based swap dealers and major security-based swap participants acting as counterparties to special entities.

(a)(1) A security-based swap dealer or major security-based swap participant that offers to enter into or enters into a security-based swap with a special entity, other than a special entity defined in § 240.15Fh–2(d)(3), must have a reasonable basis to believe that the special entity has a qualified independent representative. For these purposes, a qualified independent representative is a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Undertakes a duty to act in the best interests of the special entity;

(iv) Makes appropriate and timely disclosures to the special entity of material information concerning the security-based swap;

(v) Evaluates, consistent with any guidelines provided by the special entity, the fair pricing and the appropriateness of the security-based swap;

(vi) In the case of a special entity defined in §§ 240.15Fh–2(d)(2) or (5), is a person that is subject to rules of the Commission, the Commodity Futures Trading Commission or a self-regulatory organization subject to the jurisdiction of the Commission or the Commodity Futures Trading Commission prohibiting it from engaging in specified activities if certain political contributions have been made, *provided that* this paragraph (a)(1)(vi) shall not apply if the independent representative is an employee of the special entity; and

(vii) Is independent of the security-based swap dealer or major security-based swap participant.

(A) A representative of a special entity is independent of a security-based swap dealer or major security-based swap participant if the representative does not have a relationship with the security-based swap dealer or major security-based swap participant, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative.

(B) A representative of a special entity will be deemed to be independent of a security-based swap dealer or major security-based swap participant if:

(*1*) The representative is not and, within one year of representing the special entity in connection with the security-based swap, was not an associated person of the security-based swap dealer or major security-based swap participant;

(*2*) The representative provides timely disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the special entity and complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest; and

(*3*) The security-based swap dealer or major security-based swap participant did not refer, recommend, or introduce the representative to the special entity within one year of the representative's representation of the special entity in connection with the security-based swap.

(2) A security-based swap dealer or major security-based swap participant that offers to enter into or enters into a security-based swap with a special entity as defined in § 240.15Fh–2(d)(3) must have a reasonable basis to believe that the special entity has a representative that is a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(b) *Safe harbor.* (1) A security-based swap dealer or major security-based swap participant shall be deemed to have a reasonable basis to believe that the special entity, other than a special entity defined in § 240.15Fh–2(d)(3), has a representative that satisfies the applicable requirements of paragraph (a)(1) of this section, provided that:

(i) The special entity represents in writing to the security-based swap dealer or major security-based swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (a)(1) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (a)(1) of this section; and

(ii) The representative represents in writing to the special entity and security-based swap dealer or major security-based swap participant that the representative:

(A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (a)(1) of this section;

(B) Meets the independence test in paragraph (a)(1)(vii) of this section; has the knowledge required under paragraph (a)(1)(i) of this section; is not subject to a statutory disqualification under paragraph (a)(1)(ii) of this section; undertakes a duty to act in the best interests of the special entity as required under paragraph (a)(1)(iii) of this section; and is subject to the requirements regarding political contributions, as applicable, under paragraph (a)(1)(vi) of this section; and

(C) Is legally obligated to comply with the applicable requirements of paragraph (a)(1) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

(2) A security-based swap dealer or major security-based swap participant shall be deemed to have a reasonable basis to believe that a special entity defined in § 240.15Fh–2(d)(3) of this section has a representative that satisfies the applicable requirements in paragraph (a)(2) of this section, provided that the special entity provides in writing to the security-based swap dealer or major security-based swap participant the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) Before initiation of a security-based swap with a special entity, a security-based swap dealer shall disclose to the special entity in writing the capacity in which the security-based swap dealer is acting in connection with the security-based swap and, if the security-based swap dealer engages in business with the counterparty in more than one capacity, the security-based swap dealer shall disclose the material differences between such capacities and any other financial transaction or service involving the counterparty.

(d) The requirements of this section shall not apply with respect to a security-based swap if:

(1) The transaction is executed on a registered or exempt security-based swap execution facility or registered national securities exchange; and

(2) The security-based swap dealer or major security-based swap participant does not know the identity of the counterparty at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer or major security-based swap participant to comply with the obligations of paragraphs (a) through (c) of this section.

§ 240.15Fh–6 Political contributions by certain security-based swap dealers.

(a) *Definitions.* For the purposes of this section:

(1) The term *contribution* means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for federal, state or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for state or local office.

(2) The term *covered associate* means:

(i) Any general partner, managing member or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a municipal entity to enter into a security-based swap with the security-based swap dealer and any person who supervises, directly or indirectly, such employee; and

(iii) A political action committee controlled by the security-based swap dealer or by a person described in paragraphs (a)(2)(i) and (ii) of this section.

(3) The term *executive officer of a security-based swap dealer* means:

(i) The president;

(ii) Any vice president in charge of a principal business unit, division or function (such as sales, administration or finance);

(iii) Any other officer of the security-based swap dealer who performs a policy-making function; or

(iv) Any other person who performs similar policy-making functions for the security-based swap dealer.

(4) The term *municipal entity* is defined in section 15B(e)(8) of the Act.

(5) The term *official of a municipal entity* means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a municipal entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a security-based swap dealer by a municipal entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a security-based swap dealer by a municipal entity.

(6) The term *payment* means any gift, subscription, loan, advance, or deposit of money or anything of value.

(7) The term *regulated person* means:

(i) A person that is subject to rules of the Commission, the Commodity Futures Trading Commission or a self-regulatory organization subject to the jurisdiction of the Commission or the Commodity Futures Trading Commission prohibiting it from engaging in specified activities if certain political contributions have been made, or its officers or employees;

(ii) A general partner, managing member or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a municipal entity for the security-based swap dealer and any person who supervises, directly or indirectly, such employee.

(8) The term *solicit* means a direct or indirect communication by any person with a municipal entity for the purpose of obtaining or retaining an engagement related to a security-based swap.

(b) *Prohibitions and exceptions.* (1) It shall be unlawful for a security-based swap dealer to offer to enter into, or enter into, a security-based swap, or a trading strategy involving a security-based swap, with a municipal entity within two years after any contribution to an official of such municipal entity was made by the security-based swap dealer, or by any covered associate of the security-based swap dealer.

(2) The prohibition in paragraph (b)(1) of this section does not apply:

(i) If the only contributions made by the security-based swap dealer to an official of such municipal entity were made by a covered associate, if a natural person:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, *if* the contributions in the aggregate do not exceed $350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, *if* the contributions in the aggregate do not exceed $150 to any one official, per election;

(ii) To a security-based swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the security-based swap dealer, *however,* this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the municipal entity on behalf of the security-based swap dealer to offer to enter into, or to enter into, security-based swap, or a trading strategy involving a security-based swap; or

(iii) With respect to a security-based swap that is executed on a registered national securities exchange or registered or exempt security-based swap execution facility where the security-based swap dealer does not know the identity of the counterparty to the transaction at a reasonably sufficient time prior to execution of the transaction to permit the security-based swap dealer to comply with the obligations of paragraph (b)(1) of this section.

(3) No security-based swap dealer or any covered associate of the security-based swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a municipal entity to offer to enter into, or to enter into, a security-based swap or any trading strategy involving a security-based swap with that security-based swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a municipal entity with which the security-based swap dealer is offering to enter into, or has entered into, a security-based swap or a trading strategy involving a security-based swap; or

(B) Payment to a political party of a state or locality with which the security-based swap dealer is offering to enter into, or has entered into, a security-based swap or a trading strategy involving a security-based swap.

(c) *Circumvention of rule.* No security-based swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (a) or (b) of this section.

(d) *Requests for exemption.* The Commission, upon application, may conditionally or unconditionally exempt a security-based swap dealer from the prohibition under paragraph (b)(1) of this section. In determining whether to grant an exemption, the

Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the security-based swap dealer:

(i) Before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the security-based swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.,* federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the security-based swap dealer if:

(i) The security-based swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed $350; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the security-based swap dealer.

(2) A security-based swap dealer that has more than 50 covered associates may not rely on paragraph (e)(1) of this section more than three times in any 12-month period, while a security-based swap dealer that has 50 or fewer covered associates may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A security-based swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

§ 240.15Fk–1 Designation of chief compliance officer for security-based swap dealers and major security-based swap participants.

(a) *In general.* A security-based swap dealer and major security-based swap participant shall designate an individual to serve as a chief compliance officer on its registration form.

(b) *Duties.* The chief compliance officer shall:

(1) Report directly to the board of directors or to the senior officer of the security-based swap dealer or major security-based swap participant; and

(2) Take reasonable steps to ensure that the registrant establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with the Act and the rules and regulations thereunder relating to its business as a security-based swap dealer or major security-based swap participant by:

(i) Reviewing the compliance of the security-based swap dealer or major security-based swap participant with respect to the security-based swap dealer and major security-based swap participant requirements described in section 15F of the Act, and the rules and regulations thereunder, where the review shall involve preparing the registrant's annual assessment of its written policies and procedures reasonably designed to achieve compliance with section 15F of the Act, and the rules and regulations thereunder, by the security-based swap dealer or major security-based swap participant;

(ii) Taking reasonable steps to ensure that the registrant establishes, maintains and reviews policies and procedures reasonably designed to remediate non-compliance issues identified by the chief compliance officer through any means, including any:

(A) Compliance office review;

(B) Look-back;

(C) Internal or external audit finding;

(D) Self-reporting to the Commission and other appropriate authorities; or

(E) Complaint that can be validated; and

(iii) Taking reasonable steps to ensure that the registrant establishes and follows procedures reasonably designed for the handling, management response, remediation, retesting, and resolution of non-compliance issues;

(3) In consultation with the board of directors or the senior officer of the security-based swap dealer or major security-based swap participant, take reasonable steps to resolve any material conflicts of interest that may arise; and

(4) Administer each policy and procedure that is required to be established pursuant to section 15F of the Act and the rules and regulations thereunder.

(c) *Annual reports*—(1) *In general.* The chief compliance officer shall annually prepare and sign a compliance report that contains a description of the written policies and procedures of the security-based swap dealer or major security-based swap participant described in paragraph (b) of this section (including the code of ethics and conflict of interest policies).

(2) *Requirements.* (i) Each compliance report shall also contain, at a minimum, a description of:

(A) The security-based swap dealer or major security-based swap participant's assessment of the effectiveness of its policies and procedures relating to its business as a security-based swap dealer or major security-based swap participant;

(B) Any material changes to the registrant's policies and procedures since the date of the preceding compliance report;

(C) Any areas for improvement, and recommended potential or prospective changes or improvements to its compliance program and resources devoted to compliance;

(D) Any material non-compliance matters identified; and

(E) The financial, managerial, operational, and staffing resources set aside for compliance with the Act and the rules and regulations thereunder relating to its business as a security-based swap dealer or major security-based swap participant, including any material deficiencies in such resources.

(ii) A compliance report under paragraph (c)(1) of this section also shall:

(A) Be submitted to the Commission within 30 days following the deadline for filing the security-based swap dealer's or major security-based swap participant's annual financial report with the Commission pursuant to section 15F of the Act and rules and regulations thereunder;

(B) Be submitted to the board of directors and audit committee (or equivalent bodies) and the senior officer of the security-based swap dealer or major security-based swap participant prior to submission to the Commission;

(C) Be discussed in one or more meetings conducted by the senior officer with the chief compliance officer(s) in the preceding 12 months, the subject of which addresses the obligations in this section; and

(D) Include a certification by the chief compliance officer or senior officer that, to the best of his or her knowledge and reasonable belief and under penalty of law, the information contained in the compliance report is accurate and complete in all material respects.

(iii) *Extensions of time.* A security-based swap dealer or major security-based swap participant may request from the Commission an extension of time to submit its compliance report, provided the registrant's failure to timely submit the report could not be eliminated by the registrant without unreasonable effort or expense. Extensions of the deadline will be granted at the discretion of the Commission.

(iv) *Incorporation by reference.* A security-based swap dealer or major security-based swap participant may incorporate by reference sections of a compliance report that have been submitted within the current or immediately preceding reporting period to the Commission.

(v) *Amendments.* A security-based swap dealer or major security-based swap participant shall promptly submit an amended compliance report if material errors or omissions in the report are identified. An amendment must contain the certification required under paragraph (c)(2)(ii)(D) of this section.

(d) *Compensation and removal.* The compensation and removal of the chief compliance officer shall require the approval of a majority of the board of directors of the security-based swap dealer or major security-based swap participant.

(e) *Definitions.* For purposes of this section, references to:

(1) The *board* or *board of directors* shall include a body performing a function similar to the board of directors.

(2) The *senior officer* shall include the chief executive officer or other equivalent officer.

(3) *Complaint that can be validated* shall include any written complaint by a counterparty involving the security-based swap dealer or major security-based swap participant or associated person of a security-based swap dealer or major security-based swap participant that can be supported upon reasonable investigation.

(4) A *material non-compliance matter* means any non-compliance matter about which the board of directors of the security-based swap dealer or major security-based swap participant would reasonably need to know to oversee the compliance of the security-based swap dealer or major security-based swap participant, and that involves, without limitation:

(i) A violation of the federal securities laws relating to its business as a security-based swap dealer or major security-based swap participant by the firm or its officers, directors, employees or agents;

(ii) A violation of the policies and procedures relating to its business as a security-based swap dealer or major security-based swap participant by the firm or its officers, directors, employees or agents; or

(iii) A weakness in the design or implementation of the policies and procedures relating to its business as a security-based swap dealer or major security-based swap participant.

By the Commission.

Dated: April 14, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–10918 Filed 5–12–16; 8:45 am]

BILLING CODE 8011–01–P

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FEDERAL REGISTER

Vol. 81 Friday,
No. 93 May 13, 2016

Part III

The President

Notice of May 12, 2016—Continuation of the National Emergency With Respect to Yemen

Federal Register
Vol. 81, No. 93
Friday, May 13, 2016

Presidential Documents

Title 3—

The President

Notice of May 12, 2016

Continuation of the National Emergency With Respect to Yemen

On May 16, 2012, by Executive Order 13611, I declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of certain members of the Government of Yemen and others that threatened Yemen's peace, security, and stability, including by obstructing the implementation of the agreement of November 23, 2011, between the Government of Yemen and those in opposition to it, which provided for a peaceful transition of power that meets the legitimate demands and aspirations of the Yemeni people for change, and by obstructing the political process in Yemen.

The actions and policies of certain members of the Government of Yemen and others in threatening Yemen's peace, security, and stability continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on May 16, 2012, to deal with that threat must continue in effect beyond May 16, 2016. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13611.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
May 12, 2016.

[FR Doc. 2016–11587
Filed 5–12–16; 11:15 am]
Billing code 3295–F6–P

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